UNITED STATES OF AMERICA

BEFORE THE NATIONAL LABOR RELATIONS BOARD

REGION 29

AMAZON.COM SERVICES LLC,	)	
	)	
Employer,	)	
	)	
And	)	Case No. 29-RC-288020
	)	
AMAZON LABOR UNION,	)	
	)	
Petitioner.	)	
	)	

AMAZON LABOR UNION'S CLOSING BRIEF IN OPPOSITION TO AMAZON.COM SERVICES LLC'S OBJECTIONS TO THE CERTIFICATION OF THE JFK8 ELECTION AND IN SUPPORT OF CERTIFICATION

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Preliminary Statement

Petitioner, Amazon Labor Union (hereinafter "ALU" or "Union" or "Petitioner"), by its attorneys, after the Hearing on Amazon.com Services, LLC's (hereinafter "Amazon" or "Employer") 25 Objections to the Certification of the Election at JFK8 submits the below Closing Brief in Opposition to Amazon's Objections and in Support of the Certification of the April 1, 2022 Election Tally, the latter which demonstrates that the Amazon Labor Union was chosen as the bargaining representative by a margin of 523 votes.

Petitioner began these proceedings arguing their Motion to Dismiss Objections 1-9, 12, 14-18, 20-21, and 23-25. Petitioner argued these Objections were so legally deficient that no amount of testimony would turn them into viable objections. The record reflects that Petitioner has reason to stand by its arguments. Twenty-four days of hearings, which developed a transcript of over 5000 pages, only reinforced Petitioner's arguments in its original motion. The Employer's Objections, which Petitioner stated at the outset were legally deficient, remain so. Furthermore, the Employer failed to carry its burden of proof as to the other five Objections which were not the subject of Petitioner's Motion to Dismiss, as well: Objections 10, 11, 13, 19, and 22.

Standard of Review

In *Laurel Baye Healthcare of Lake Lanier, LLC v. NLRB,* 209 F. App'x 345, (4th Cir.. 2006) the Court stated:

> It is well settled that the Board is vested "with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" through an election. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S. Ct. 324, 91 L. Ed. 322 (1946); *see NLRB v. Kentucky Tennessee Clay Co.*, 295 F. 3d 436, 441 (4th Cir. 2002).

> The results of an NLRB-supervised representative election are presumptively valid and we must uphold findings and conclusions of the Board so long as the decision is reasonable and based upon substantial evidence in the record considered as a whole." *Kentucky Tennessee*, 295 F.3d at 441 (internal quotation marks, citation, and alterations omitted)."
>
> However, "because the employees' right to exercise a fair and free choice in a representation election is the mandate, elections must be conducted in laboratory conditions, free from behavior that improperly influences the outcome." *Id*. (internal quotation marks and citations omitted); *see also NLRB v. Georgetown Dress Corp.*, 537 F.2d 1239, 1242 (4th Cir. 1976). The employer may rebut the presumption that the election is valid, but only if it presents "specific evidence not only that the alleged acts of interference occurred but also that such acts sufficiently inhibited the free choice of employees as to affect materially the results of the election." *Overnite Transp. Co. v. NLRB*, 294 F.3d 615, 623 (4th Cir. 2002) (internal quotation marks omitted); *see also NLRB v. Urban Tel. Corp.*, 499 F.2d 239, 242 (7th Cir. 1974) ("For conduct to warrant setting aside an election, not only must the conduct be coercive, but it must be so related to the election as to have had a probable effect upon the employees' actions at the polls.").

"It is well established that "in making its determination as to whether the [alleged] conduct has the tendency to interfere with employees' freedom of choice, the Board will consider, *inter alia,* the closeness of the election." *Cambridge Tool & Mfg. Co*., 316 NLRB 716, 716 (1995). The Hearing Officer and the Regional Director should also consider the Board's admonition in *Newport News Shipbuilding & Dry Dock Co.*, 239 NLRB 82, 90 (1978), to "avoid unrealistic standards which insist on improbable purity of word and deed on the part of the parties or Board agents. Otherwise, in any hard-fought campaign involving a large number of voters, it would be impossible to conduct an election which could not be invalidated by a party disappointed in the election results." *See also NLRB v. Herbert Halperin Distrib. Corp*., 826 F.2d 287, 290 (4th Cir. 1987) (it has long been recognized that representation elections are "heated affair[s]" and, consequently, an election will not be set aside "unless an atmosphere of fear and coercion rendered free choice impossible.")

It is also well settled that a representation election is not lightly set aside. *NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Monroe Auto Equip. Co.,* 470 F.2d 1329, 1333 (5th Cir.1972)). The burden of proof on parties seeking to have a Board-

supervised election set aside is a heavy one. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989). In *General Shoe Corp*., 77 NLRB 124, 127 (1948), the Board held that conduct which creates an atmosphere which renders improbable a free choice will warrant invalidating an election. The Board reasoned as follows:

> In election proceedings, it is the Board's function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled. When, in the rare extreme case, the standard drops too low, because of our fault or that of others, the requisite laboratory conditions are not present and the experiment must be conducted over again. *Id*. at 127.

Under the *General Shoe* doctrine, the test of conduct which may interfere with the "laboratory conditions" for an election is considerably more restrictive than the test of conduct amounting to interference, restraint, or coercion which violates Section 8(a)(1). See, e.g., *Purple Communications, Inc.*, 361 NLRB No. 43, slip op. at 3 fn. 12 (2014); *Dal-Tex Optical Co*., 137 NLRB 1782, 1786–1787 (1962); see also *Heartland Human Services v. NLRB*, 746 F.3d 802, 804 (7th Cir. 2014).

In evaluating party conduct during the critical period, the Board applies an objective standard, under which conduct is found to be objectionable if it has "the tendency to interfere with the employees' freedom of choice." *See, Cambridge Tool & Mfg. Co*., *supra*, at 716.

Consequently, the challenging party must bear the heavy burden of proving, by specific evidence, both that improprieties occurred and that these improprieties prevented a fair election. By extension, "minor violations . . . of 'policy,' having no apparent effect on an election result, may not serve as the basis to overturn such election." *Elizabethtown Gas*, 212 F.3d at 268; *Case Farms*

of N.C., Inc. v. NLRB, 128 F.3d 841, 844 (4th Cir. 1997) (noting that while the NLRB's goal in supervising elections is to create "laboratory conditions" in which to ascertain the desires of the employees, "elections do not occur in a laboratory," and, accordingly, "the actual facts must be assessed in the light of realistic standards of human conduct" (internal quotations omitted)). *Mail Contractors of Am., Inc. v. NLRB*, 122 F. App'x 635, 637 (4th Cir. 2005). As established by the hearing, no conduct warrants overturning the election results, and the wide margin of victory establishes that the April 1, 2022 Election Tally must be certified.

Scope for the Hearing

The Casehandling Manual at Section 11395.3 states, "The Hearing Officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director." In the instant matter, Regional Director for Region 28 of the National Labor Relations Board, Cornele A. Overstreet, to whom this proceeding was transferred upon an April 8, 2022 motion by the Employer, considered the Employer's offers of proof filed on April 22, 2022. On April 29, 2022 Regional Director Overstreet ruled that "the hearing on objections **as described above** will be conducted before the Hearing Officer of the National Labor Relations Board …" *See* Board Exhibit 1a (*emphasis added).* Section 11424.3(b) states, "The Hearing Officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. Thus, any allegations based on any new legal theory or different factual circumstances are insufficiently related to the objections set by the Regional Director for hearing and should not be considered. *See Precision Products Group, Inc.*, 319 NLRB 640 (1995); *Iowa Lamb Corp.*, 275 NLRB 185 (1985)." Thus, despite the Employer's repeated attempts throughout the record to expand the scope of its Objections, the appropriate scope for this Hearing on Objections must be

only as ordered and listed pursuant to Regional Director Overstreet's April 29, 2022 "Order Directing Hearing and Notice of Hearing on Objections." *See* Board Exhibit 1a. Despite arguing that the Regional Director's Order was only a summary of the Objections set for hearing, the Employer conceded in the record that the "Hearing Officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific Objection set for hearing by the Regional Director." *See* Tr. 3178: 9-13.

I. ALL OF THE OBJECTIONS DIRECTED AT REGION 29 MUST BE OVERRULED

As noted, the Board is vested "with a wide degree of discretion in establishing the procedure and safeguards necessary to insure the fair and free choice of bargaining representatives by employees" through an election. *NLRB v. A.J. Tower Co.*, 329 U.S. 324, 330, 67 S. Ct. 324, 91 L. Ed. 322 (1946); *see NLRB v. Kentucky Tennessee Clay Co.*, 295 F. 3d 436, 441 (4th Cir. 2002).

The Employer's Objections 1-9 and 12 were the subject of Petitioner's Motion to Dismiss. One of the main bases for the motion, which the record has not disturbed, is that there is no precedent for the Employer's claims that actions of the Region or the NLRB General Counsel, outside of the election itself, can be a legitimate basis for an Objection to the Certification of the Tally. Indeed, the case-law relied on by Amazon for many of its Objections against Region 29, *Ensign Sonoma, LLC,* 342 NLRB 933(2004), and *Athbro Precision Engineering Corp.*, 166 NLRB 116 (1967), refer only to conduct of Board agents during the actual conducting of the election, not to conduct outside the context of a representation election. In *Ensign Sonoma*, the Board adopted the standard that elections may be set aside if the conduct of the Board agent tends to destroy the confidence in the election process or could be reasonably interpreted as impairing the election procedures that the Board seeks to maintain. These cases are limited to actual elections and require Board agents to maintain strict neutrality in how they act and speak while conducting the

representation election. These cases do not extend to other actions of the NLRB, its Regions or the General Counsel. This is true for good reason. The NLRB has many functions other than conducting representation elections. The Board must ensure, for example, that workers' Section 7 rights to form and join unions, collectively bargain, and engage in other mutual aid and protection are protected. The majority of the allegations made by the Employer against the Region, are collateral attacks on the agency's functions outside the actual running of representation elections. Accordingly, as argued herein, even if such facts regarding the conduct of the Board were established—which they were not—such conduct would not form a basis to overturn the results of the election.

A. Objections 1 and 2 Impermissibly Invade the Agency's Prosecutorial Discretion

Objections 1 and 2 state as follows:

> **Objection 1 :** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it sought a 10(j) injunction in *Drew-King v. Amazon.com Services LLC*, E.D.N.Y., No. 22-01479, on March 17, 2022
>
> **Objection 2:** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it delayed investigating numerous unmeritorious and frivolous unfair labor practice charges that were pending during the critical period rather than properly dismissing them or soliciting withdrawals

Objections 1 and 2 threaten the heart of the Section 7 rights that are enshrined in the National Labor Relations Act ("NLRA" or "the Act") and the power and duty of the General Counsel for the National Labor Relations Board to enforce those rights when the Federal Government determines they were likely violated. Before even proceeding to the law and absence of evidence in the record, simple logic suggests that Objections 1 and 2 are baseless.

In an effort to cast doubt on the integrity of Region 29, Amazon misstated the identity of the party that sought 10(j) relief in the framing of Objection 1. It is widely known that under the Act, it is the Board itself and not the General Counsel or "the Region" that authorizes a petition for 10(j) relief. *See*, 29 U.S.C. § 160(j). Amazon's Objection describing "the Region" as the actor is thus misplaced. Indeed, the Order of the Hearing Officer rejecting the Employer's offers of proof as to Objections 1-5 was correct given their legally deficient nature.

In response to Objection 2, it is also undisputed that the General Counsel did authorize the issuance of Complaints on a substantial number of the unfair labor practice charges filed by the Petitioner during and before the critical period. *See*, ALU Exs. 31, 32. Thus, Amazon alleges no action that in any way might have benefited the Union or influenced employees to favor union representation. In fact, unsuccessfully seeking 10(j) relief and failing to issue complaints in response to unfair labor practice charges are more likely to have reduced support for the Petitioner than encouraged support. With respect to the petition for 10(j) relief, the Regional Director had already found merit in the Unfair Labor Practice charge and issued a complaint on December 22, 2020 The delay in seeking Court intervention was caused by Amazon itself. In fact, subsequent to the filing for 10(j) relief, ALJ Benjamin Green determined that Amazon had violated the NLRA in terminating the employment of Gerald Bryson and found that Mr. Bryson should be restored to his previous position without loss of seniority and with back pay. In addition, ALJ Green found that Amazon's own failure to comply with lawfully issued subpoenas caused the undue delay in the Bryson hearing. *See*, ALU. Ex. 30, at Pg 10 - 11. The Employer simply cannot get any benefit from causing the delayed circumstances that it now complains of and points to as a reason for not certifying the results of this election. There is simply no reason to believe the alleged actions or delays (in the General Counsel seeking 10(j) relief in the Gerald Bryson matter) had any "tendency

to interfere with the employees' freedom of choice" or affected the outcome of the election. *Cambridge Tool & Mfg. Co*., 316 NLRB 716, 716 (1995). The alleged actions or omissions simply cannot have "had a probable effect on the employee's action at the polls." *Great Atl. & Pac. Tea Co*., 177 NLRB 942, 942-43 (1969).

Despite the Board seeking 10(j) relief on March 17, 2022, the court did not act on the request prior to the election, and the General Counsel took no affirmative action on certain unfair labor practice charges filed by the Petitioner prior to the election. Amazon's objections to the filing of a petition for a preliminary injunction under Section 10(j) and the timing of processing unfair labor practice charges cannot be a basis for a claim that the "Region failed to protect the neutrality and integrity of the Board procedures creating the impression of Board assistance to the ALU." To sustain such an objection would mean every determination by the General Counsel prior to a representation election could be subject to a claim of bias by the disappointed party to frustrate Section 7 election activities when the General Counsel was merely acting within her unreviewable discretion to enforce the NLRA.

Similar arguments exist to support overruling Objection 2. Even if there was any logic to these two objections, the law is clear that Amazon cannot challenge the General Counsel's prosecutorial decisions through an Objections hearing in a Representation Case. Quoting the Conference Committee Report on the Taft-Hartley amendments, the Supreme Court has made it clear that it is the "General Counsel of the Board ... [who] is to have the final authority to act in the name of, but independently of any direction, control, or *review* by, the Board *in respect of the investigation of charges and the issuance of complaints of unfair labor practices, and in respect of the prosecution of such complaints before the Board.*" H.R.Conf.Rep. No. 510, 80th Cong., 1st Sess., 37 (1947), U.S.Code Cong.Serv.1947, p. 1135." *NLRB v. United Food and Commercial*

Workers Union, Local 23, 484 U.S. 112, 124-25 (1987) (*emphasis added*). The Supreme Court characterized the General Counsel's authority in these respects as "unreviewable discretion" and made clear that "'prosecutorial' determinations" are "to be made solely by the General Counsel" and "are not subject to review under the Act." *Id*. at 126, 130. Thus, the General Counsel's decisions about how quickly to investigate charges, whether to dismiss charges, and whether to recommend to the Board that it petition for 10(j) relief are not reviewable by the Board or the courts in any proceeding under the Act, including a representation proceeding in which the Board is the ultimate decision-maker. *See* 29 U.S.C. § 153(b); 29 C.F.R. § 206.69(c)(2).

Of course, there are many factors that may bear on how the General Counsel exercises her discretion in a case like this. The regional office may be busy and understaffed. Charges that appear on their face to be meritorious may be prioritized over other charges for investigation. The General Counsel may wish to wait for the record to close in an unfair labor practice proceeding or for a decision by an Administrative Law Judge before seeking authorization to pursue 10(j) relief. That complex of considerations is why Congress deliberately chose to insulate the General Counsel's decisions from review by the Board and the courts. Objections 1 and 2 fail for this reason as well and cannot be relied on to overturn this election.

Finally, Amazon even being permitted to pursue these objections is contrary to the fundamental policies underlying the Act and potentially could open a floodgate of Objections to Elections to pour through. Unions will object that the General Counsel failed to issue a complaint or failed to issue a complaint soon enough. Employers will object that the General Counsel issued a complaint or issued it during the critical period. Unions will object that the General Counsel failed to seek 10(j) relief. Employers will object that the General Counsel sought 10(j) relief. It is the General Counsel's and the Board's duty to uphold that policy using the mechanisms available

under Section 10. If parties subject to unfair labor practice charges can question and investigate the General Counsel's and Board's actions under Section 10 via a collateral attack under Section 9, the policies underlying the Act will be undermined and its enforcement crippled. This will completely frustrate the fundamental policy of the Act that employees be able to exercise their Section 7 rights free from interference. Obviously one of the most sacred of rights is to choose whether or not to elect a collective bargaining representative.

Not surprisingly, Amazon has entered no relevant evidence in support of these Objections to overturn this election into the record. Although the Employer was allowed to introduce into the record the Petitioner's withdrawn ULP charges filed during or before the critical period, the Petitioner in response entered two consolidated ULP charges (encompassing 11 individual charges) which were issued. *See*, Emp. Exs. 728 - 738, 2728, Pet. Exs. 31 and 32. Thus any claim that the Petitioner filed unmeritorious and frivolous charges fails.

Most telling, with respect to Objections 1 and 2, the Employer failed to produce even **one witness**, or attempt to proffer such testimony of a witness, who had any knowledge of either the 10(j) or any unfair labor practices charges. Thus raising Objections 1 and 2 is fundamental legal error and amounts to frivolous sanctionable conduct. As a result these Objections must be overruled as a matter of both fact and law.

B. Objections 3-5 Are an Impermissible Collateral Attack on the Board's Finding That the Petitioner Had A Sufficient Showing of Interest to Proceed to An Election

Objections 3-5 state as follows:

> **Objections 3:** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it allowed the Petitioner's petition in Case 29-RC-288020 to proceed to election knowing that the Petitioner

did not have the required 30% showing of interest in the petitioned-for unit.

Objection 4: The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it impermissibly allowed the Petitioner for more than a month (from December 22, 2021 to January 25,2022) to continue gathering and submitting late signatures to bolster its insufficient showing of interest.

Objection 5: The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it unilaterally altered the scope and size of the petitioned-for unit for the purpose of investigating the Petitioner's showing of interest

Objections 3-5, while couched in terms of integrity and neutrality, are nothing more than an impermissible collateral legal attack on the Regional Director's finding that an adequate showing of interest has been established to proceed to an election. It is clearly established, however, that the adequacy of the showing of interest cannot be litigated post-election. It should also be emphasized that the Employer voluntarily entered into a Stipulated Election Agreement on February 17, 2022, which Stipulation did not dispute the showing of interest despite the fact that it had raised it in Attachment E to its Statement of Position dated January 28, 2022. *See* BD Exhibit 1(i), Attachment A. Under the Stipulated Election Agreement "[t]he parties waive their right to a hearing and agree that any notice of hearing previously issued in this matter is withdrawn, that the petition is amended to conform to this Agreement, and that the record of this case shall include this Agreement and be governed by the Board's Rules and Regulations." Nowhere in the February 17, 2022 Agreement does the Employer raise any concerns about the showing of interest and by signing such agreement it has waived its right to raise any concerns it had with the showing of interest via a pre-election hearing.

Furthermore, the Board has clearly held that the adequacy of the showing of interest is a matter for the Board alone and is not litigable by the parties. Moreover, given that the purpose of the showing of interest requirement is simply to ensure that it is not a waste of government resources for the Region to conduct an election, after an election is held, the adequacy of such showing of interest is irrelevant, as the Region's resources have already been expended. Thus, in *Gaylord Bag Co*., 313 NLRB 306, 306-07 (1993), the Board explained:

> The Board consistently has held that the showing of interest is a matter for administrative determination, and is not litigable by the parties. See, e.g., *Barnes Hospital*, 306 NLRB 201 fn. 2 (1992); *Globe Iron Foundry*, 112 NLRB 1200 (1955); *Potomac Electric Power Co.*, 111 NLRB 553, 554 (1955). It is exclusively within the Board's discretion to determine whether a party's showing of interest is sufficient to warrant processing a petition. *S. H. Kress & Co.*, 137 NLRB 1244, 1248 (1962). The purpose of a showing of interest is to determine whether the conduct of an election serves a useful purpose under the statute—that is, whether there is sufficient employee interest to warrant the expenditure of time, effort, and funds to conduct an election. *NLRB v. J. I. Case Co.*, 201 F.2d 597 (9th Cir. 1953); *Stockton Roofing Co.*, 304 NLRB 699 (1991), and cases cited there. Whether the employees desire representation is determined by the election, not by the showing of interest. *NLRB v. J. I. Case Co.*, supra.

Couching the Region's actions as somehow failing to "protect the integrity and neutrality of its procedures and creat[ing] the impression of Board assistance and support for the ALU" by making a determination that there was a sufficient showing of interest is an impermissible collateral attack on the Agency. These findings certainly have no impact on laboratory conditions during the actual election and/or critical period.

As early as 1946, the Board made clear that the adequacy of a showing of interest is "not subject to direct *or collateral* attack at hearings." *O.D. Jennings & Co*., 68 NLRB 516, 518 (1946). Finally, "[a]n integral and essential element of the Board's showing-of-interest rule is the nonlitigability of a petitioner's evidence as to such interest. The Board reserves to itself the function of investigating such claims, and in its investigation it endeavors to keep the identity of

the employees involved secret from the employer and other participating labor organizations. . . . The Board's requirement that petitions be supported by a 30-percent showing of interest gives rise to no special obligation or right on the part of employers." *S. H. Kress & Co.*, 137 NLRB 1244, 1248–1249 (1962).

On the record the Hearing Officer ruled, consistent with settled case law: "[w]hile any information offered by a party bearing on the validity and authenticity of the showing should be considered, no party has the right to litigate the subject either directly or collaterally, including during any representation hearing that may be held after an election has been held. The adequacy of the showing of interest is irrelevant. *Gaylord Bag Company*, 313 NLRB 306 (1993)." *See* Tr. 2258:14-22. The Employer's attempt to introduce records which it claimed put the finding of an adequate showing of interest in doubt were properly rejected by the Hearing Officer.

These particular Objections are illogical as the only remedy available to the Employer should Objections 3 - 5 be sustained, would be the ordering of a re-run election where no new showing of interest is required, demonstrating that the showing of interest is wholly not relevant to the Employer's ultimate remedy in this hearing. *See, River City Elevator Co,* 339 NLRB 616 (2003); CHM Sec. 22-120. In this context Amazon could continue to renew the same Objections 3-5 to the original showing of interest, *ad nauseum*, every time the Amazon Labor Union were to win a re-run election, in a never ending loop. Such a finding would be completely antithetical to the written word, spirit and purpose of the Act. This is clearly not the intention of the rules and applicable law and is just one of the many reasons that the determination of showing of interest is non-litigable. To raise the showing of interest as an Objection in the post election period is legal error and amounts to frivolous sanctionable conduct.

C. Objections 6 and 7 Must Be Rejected as They Are Merely *Ex-Post Facto* criticism of the Regional Director's Discretion to Make Reasonable Choices in How to Deploy the Agency's Resources

Objections 6 and 7 state as follows:

> **Objection 6:** The Region failed to protect the integrity of its procedures when it deviated from the Casehandling Manual on Representation Proceedings by failing to staff the election adequately. Among other things, the Region provided an insufficient number of Board Agents for check-in and failed to provide adequate equipment for the election, supplying only three voting booths for an election with more than 8,000 potential voters.
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> **Objection 7:** The Region failed to protect the integrity of its procedures when it turned away voters when they attempted to vote during open polling sessions, and told voters they were only being allowed to vote in alphabetical order

Objections 6 and 7 are nothing more than *ex-post facto* criticism of reasonable choices made by the Regional Director, in its wide discretion regarding how to deploy its resources to conduct this election, which for the most part, the Employer, without complaint, was aware of beforehand. That is, after consenting to a procedure well in advance of the election, the Employer, unsatisfied with the outcome of the election, now in bad faith seeks to attack the reasonable decisions made by the Regional Director. Such arguments are not properly the basis of Objections. Further, in arguing that long lines on the first day affected the outcome of the election, Amazon in bad faith, complains of a condition of its own creation by failing to implement crowd control as it had agreed to do. Most crucially, however, Objections 6 and 7 fail as no testimony was elicited to establish that any voters were turned away as a result of such lines.

It is well settled that the Regional Director has broad discretion in making election arrangements, and in the absence of objective evidence that this discretion has been abused, the election is upheld. See, e.g., *Milham Products Co*., 114 NLRB 1544, 1546 (1955); *Independent Rice Mill, Inc*., 111 NLRB 536, 537 (1955); see also *Comfort Slipper Corp*., 112 NLRB 183 (1955)

(discretion to determine date of election); *New York Shipping Assn*., 109 NLRB 310 (1954) (use of IBM voting cards as an additional means of identification of voters). Under Section 11308 of the Case Handling Manual: "The Board agent in charge of an election, with his/her supervisor, should anticipate the need for sufficient Board personnel to run the election. In so doing, the Board agent should keep in mind the fact that the administration of Section 9 constitutes one of the most important aspects of the Agency's work; the Board agent should plan, not with respect to the routine aspects of an uneventful election, but with due regard for all potential emergencies. Generally speaking, one Board agent will be required for each check-in table at each polling place. In addition, Board agents may be required for relief and for supervision. Due provision should be made for extended hours." Eight (8) Board Agents were present for the first voting session. *See*, Tr. 330:6 - 336:15.

There are no absolute guidelines, however, as clearly stated in *Polymers, Inc.*, 174 NLRB at 282: Election procedures prescribed by the General Counsel or a Regional Director are obviously intended to indicate to field personnel those safeguards of accuracy and security thought to be optimal in typical election situations. These desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstance. The question which the Board must decide in each case in which there is a challenge to conduct of the election is whether the manner in which the election was conducted raises a reasonable doubt as to the fairness and validity of the election. Thus, an objection relating to the integrity of the election process requires an assessment of whether the facts indicate that "a reasonable possibility of irregularity inhered" in the conduct of the election. *See, Peoples Drug Stores, Inc*., 202 NLRB 1145 (1973) (in which the Board examined the theoretical possibility as against the improbabilities of the factual circumstances).

Section 11395.5 of the CHM states that: "With respect to any given election … there should be one or more check-in tables, a challenge table, if necessary, and sufficient chairs for all Board agents and observers." The Employer presented no evidence that Amazon ever objected at any time prior to the election to the use of 3 voting booths and 1 challenge booth. In fact, the Employer, through Counsel, confirmed their agreement to this arrangement as early as February 17, 2022 without articulating any complaint or concerns. *See*, ALU Ex. 9. The Employer presented absolutely no evidence that they ever objected to Region 29's clearly stated intentions to break up the voting lines into three (3) groups based on the letter of employees' last names, again, through counsel the Employer failed to raise any questions or concerns about the procedures for the election. *See*, ALU Ex. 3. Before the election started, the Board Agents set up four (4) voting booths (including one for challenged voters) and separated the check-in tables for voters on an alphabetical basis. *See*, Tr. 336:16 - 337:13; Tr. 626:7 - 626:19; Tr. 674:13 - 674:20; Tr. 4462:14 - 4462:23. Amazon's Director of Employee Relations admitted on the record that Amazon "had no issues with voters voting pursuant to the terms of the agreement and checking into a table based on their last name." *See*, Tr. 2340:22 - 2340:24

The employer failed to demonstrate both that the election was not properly staffed nor supplied, and failed to demonstrate that the voting list divided by the first initial of the voter's last name actually had any effect on the election whatsoever. The employer presented absolutely no evidence that **even a single employee** was unable to cast a ballot due to the alleged lack of staffing and equipment at the JFK8 election or because the check-in tables were broken down alphabetically. **More importantly there was not even one employee who testified that they were turned away from voting. Such failure by Amazon is alone dispositive of Objections 6 and 7.**

Throughout the election, the election set up complied with the Casehandling Manual and was consented to by the parties in the pre-election conferences and inspection[1]. The Employer produced no evidence that it had ever raised any concerns about staffing or equipment during the morning session of and prior to March 25, 2022. On March 22, 2022 during the pre-election inspection, representatives from the Employer had an earlier opportunity to raise any issue with the Region regarding dissatisfaction with the number of voting booths and failed to do so. *See* Tr 2278:5-2279:15. The concerns that they raised after the morning session were considered by the Board Agent in charge of the election as well as by her supervisor, and they determined that the conditions were in complete compliance with the Casehandling Manual.

Amazon Director of Employee Relations, Barbara Russell testified she approached Ioulia Federova, Region 29 Board Agent, to:

> "request[ ] that the Board set up additional voting booths. The Board had brought more voting booths than they were using, and we showed that there was sufficient space to put up additional voting booths. Ioulia declined our request and indicated that the number of voting booths was sufficient. And she said that the number of voting booths was not what was causing the delays in voting. We asked if Ioulia would send additional Board agents to help with the staffing, again, to better expedite voting as well as better monitor the no-electioneering zone from media and other interference. And she declined our request to

[1] The tent in which the election took place was a 30' x 100' white tent similar to the style of tent that might be used in a wedding. See, Tr. 304:11 - 305:1; *See* also, Emp. Ex. 182. The tent was located in the parking lot in front of the main entrance to the Employer's facility, which is the north-facing side of the building. See, Tr. 309:17 - 309:22; Emp. Ex. 182; See also, Tr. 1678:20 - 1678:24. An inspection of the tent was conducted by Amazon, Region 29 and the ALU on March 22. See, Tr. 310:7 - 311:20. At the inspection, other than Region 29 asking for a table to be moved (which was in fact moved immediately) neither Amazon, nor Region 29 asked for any additional modifications nor were any concerns raised with respect to the tent. See, Tr. 312:25 - 313:18. The condition of the inside of the tent prior to the start of the election but after the inspection is reflected in a photograph admitted as Employer Exhibit 185. Subsequent to the inspection but prior to the election, Amazon added an awning to the side of the tent in order to protect voters from potential rain. See, Tr. 323:2 - 323:10. Despite eliciting a generous amount of testimony on the set up of the voting tent and the placement of the stanchions to make lines efficient, the Employer never raised any concerns about the tent set up in the pre-election period, nor did the testimony elicited substantiate their Objections.

add more Board agents. She, more than once, said that things were busy, but it's fine." *See,* Tr. 2324-2325.

Not satisfied with this answer, Ms. Russell also approached Assistant Regional Director for Region 29, Teresa Poor: "Ms. Poor indicated that she had spoken to Ioulia and that it was expected that the first voting period would be busy, but that Ioulia had indicated that things were fine, that they did not need to add more check-in tables, they did not need to add more voting tables, and they did not need to add more Board agents." *See* Tr. 2335:12 - 2335:24. Indeed, the testimony establishes that Region 29 adequately staffed the election, and did not do anything to compromise the integrity of its procedures.

On the morning of March 25, 2022, the Company and Union representatives left the voting tent by 7:59 a.m. *See*, Tr. 344:24 - 345:1. Prior to 8:00 a.m., the board agents gave instructions to the observers. *See*, Tr. 541:24 - 544:18. Amazon and the Union each had three (3) observers present for each voting session. *See*, Tr. 4456:22 - 4457:9; Emp. Ex. 182. The employer failed to elicit any testimony from its over 50 witnesses that each check-in table did not have one Board agent present at the polls throughout this election.

In the very first session, Amazon's observers were Antonia Famiglietti, Dio Sanchez, and Emmanuel DeLeon. *See*, Tr. 578:3 - 578:25; Tr. 636:5 - 636:9 Tr. 1335:2 - 1335:15. During this first voting session there were four (4) voting booths, one for each of the three check-in tables as well as a booth for challenged ballots, and in addition there were two (2) ballot boxes; one for regular ballots and another for challenged ballots. *See*, Tr. 612:15 - 612:25. There was a board agent present at each of the three check-in tables. *See*, Tr. 620:11 - 620:14; Tr. 1335:16 - 1336:6.; Tr. 1353:21 - 1354:18. Prior to the start of the first voting session, observers were given instructions wherein they were told how to check off voters on the voter list as they came to vote,

each observer was given a specific colored pencil and each observer was instructed that if a voter's name was not on the list that that voter should be directed to speak to a board agent. The observers were also given buttons to wear identifying themselves as observers. Additionally, prior to the voting session commencing, the NLRB showed the observers the empty ballot boxes for regular and challenged ballots so they could ensure the boxes started empty. The observers were additionally told that they should not speak to the voters and that if the voters had questions they should be directed to NLRB agents who would answer those questions. *See*, Tr. 622:18 - 623:23; Tr. 626:20 - 627:4; Tr. 647:4 - 647:22; Tr. 675:1 - 675:20; Tr. 677:1 - 677:22; Tr. 1354:19 - 1356:13; Tr. 4457:10 - 4459:18. These same instructions were given at subsequent voting sessions as well. *See*, Tr. 1357:1 - 1357:9; Tr. 1566:3 - 1566:12; Tr. 1567:10 - 1568:12; Tr. 4460:25 - 4462:5.

At all times during the election, voters all agreed that there was a company observer, an ALU observer and an NLRB agent at each check-in table, and that voters' IDs were checked, they were given ballots by an NLRB agent and were directed to vote in one of the voting booths. *See*, Tr. 793:2 - 794:19; Tr. 841:11 - 842:7; Tr. 855:6 - 856:5; Tr. 979:19 - 979:25; Tr. 980:2 - 981:2; Tr. 1034:5 - 1034:22; Tr. 1063:16 - 1064:3; Tr. 1066:3 - 1066:9; Tr. 1094:11 - 1095:3; Tr. 1138:10 - 1139:16; Tr. 1229:23 - 1230:1; Tr. 1273:16 - 1274:4; Tr. 1429:14 - 1430:16; Tr. 1550:19 - 1550:24; Tr. 1568:19 - 1569:16.

Despite these appropriate election conditions, Amazon's points to long lines during the very first voting session as evidence in support of Objection 6. While Amazon's evidence in support of Objection 6 essentially consisted of testimony regarding long lines during the very first voting session, noticeably absent, however, was any evidence of interference with voter free choice. Although there were long lines to vote, this fact is not a basis upon which a representation

election can be set aside, especially where the margin of victory is 523 votes or 11% and the Employer has failed to present **even a single witness who** actually testified that they did not vote as a result of the long lines. The thrust of Employer's Objection 6 is disingenuous, since Amazon is the party responsible for the long lines during the first voting session on March 25, 2022, not Region 29[2]. The Employer is attempting to overturn the election based on its own bad conduct. The Employer failed to explain how the length of the voting lines, or the number of Board Agents interfered in any way with employee free choice.

Moreover, Amazon's own witness, Tyler Grabowski, admitted on cross examination that he signed and filed a Certification under penalty of perjury with Region 29 regarding the instant Representation petition. *See* Tr. 2647:20 - 2647:22; *See also,* ALU Ex. 18. Pursuant to paragraph 2 of ALU Ex. 18, Grabowski certified: "Amazon will implement crowd control protocols to minimize the number of voters congregating at polling areas, including staggered self-release from work to vote, and will ensure enough space within each voting or waiting tent to allow for proper distancing." Despite his certification that Amazon would implement crowd control protocols, Mr. Grabowski admitted that he did nothing to make sure such protocols were adhered to and in fact had no knowledge as to who was supervising these "protocols". *See* Tr. 2652- 2657. In fact, the sum and substance of Mr. Grabowski's testimony regarding his certification was that he did not remember who prepared the certification he signed under penalty of perjury nor did he remember why he was told he needed to sign the document nor what his certification on this document meant. *See* Tr. 2658-2669. Despite filing a certification that Amazon would implement crowd control protocols to minimize the number of voters congregating at the polls, their own witnesses failed to provide evidence in support of such a contention. In fact, the evidence demonstrated that

[2] To the extent long lines are objectionable, which of course they are not.

Amazon intentionally created long lines during the first voting session. Mr. Grabowski's credibility as an authorized representative of the Employer qualified and competent to file this certification is dubious at best and can only point to the fact that it never intended to stagger the release of voters to control the number of voters in line.

Voter Gopi Vaidya testified regarding the length of the lines that she observed on March 25, 2022. Ms. Vaidya stated on direct examination that "the whole floor has to sign out and they all send all the associates downstairs to go and vote within that hour." *See*, Tr. 2076:24 - 2077:2. In fact Ms. Vaidya's testimony makes it very clear that Amazon was responsible for the length of the voting lines on March 25, 2022. The Employer is now attempting in bad faith to complain of conditions that they themselves created. Ms. Vaidya was forced to admit on cross examination that managers and process assistants were communicating to her and other employees on March 25, 2022 that employees would be released to vote only from 8:00am to 9:00am and that all employees must return to their workstations before 9:00am. *See*, Tr. 2107:7 - 2108:25. She elaborated further on cross examination that on March 29, 2022 "There were, like, no long lines at that time because people -- they weren't voting in that time frame. But the tents were open at that point, but the floor managers and everybody wouldn't allow all the associates to come out at that time." *See*, Tr. 2111:6 - 15.

Voter Lisa Laporta also testified that on March 25, 2022 the employer "got us all together in a straight line to get ready to walk out of the building to go vote. … They just said, "form a line, we're going to vote."' *See*, Tr. 2138:22 - 2139:5 Clearly, not only was the employer violating the release time agreement by its conduct, it also was acting to coerce employees to vote by making them form a line to go and vote by whole department.

Such conduct on behalf of the employer is a total repudiation of the agreement that they had made with Region 29 and the Petitioner that employees would be released pursuant to a schedule and that voters would also be permitted to vote at any time without any negative employment action. It is unrebutted that the employer, through its own conduct, caused many employees to believe that they needed to vote on March 25, 2022 in the morning session and that they would not be given another opportunity to vote. Not even one manager testified that they were communicating with employees that the polls would remain open for several days and that there were times other than the morning session on March 25, 2022 when they could vote.

Although not a single employee testified that they were unable to vote as a result of the long lines, there were a couple of witnesses who testified they saw voters leave the line. This is simply not evidence that these employees did not subsequently vote on another date. In fact, Gopi Vaidya testified on cross examination that those voters that she saw leave the voting line on March 25, 2022 "went the next day and they finished their voting." *See*, Tr. 2109:4-:2109:8. The employer also called Robert Nicoletti who, when asked how many people he had seen leave the line without voting, testified "[n]ot many. Not many. … Maybe a handful, five people." *See*, Tr. 2199: 4-10. On cross examination, Mr. Nicoletti was forced to admit that he "would not have spoken to them about their experience voting or not voting … [and] would have no idea if, after they left the line, if they came back on another day in time to vote ". *See*, Tr. 2208:5-2208:12. During cross examination by the Representative for Region 29, Mr. Nicoletti also admitted that he knew "[f]rom what they told me, they were going to vote the next day and that they voted on that Saturday because they were working the next day." *See*, Tr. 2211:10 - 2211:15.

The remaining witnesses who testified with respect to the long lines on March 25, 2022 were all able to cast their ballots despite the length of the line. It should be noted that no voter testified to being "turned away" from voting by Region 29.

Natasha Grajeda testified that she voted during the very first voting session on March 25, 2022. She went out to vote around 8:30 - 9:00 a.m. and exited the voting tent around 11:30 a.m. *See*, Tr. 745:8 - 745:24. Ms. Grajeda went outside to vote pursuant to the voter release schedule that was posted in the building and she understood that while she was outside waiting on line that she would be paid for her time. *See*, Tr. 782:7 - 783:4. Ms. Grajeda also indicated that pursuant to the voter release schedule, her section stopped working again on Saturday, and she again would have had the opportunity to vote on company time had she not done so on Friday. *See*, Tr. 783:5 - 783:22.

The long lines did not deter voters from exercising their free choice. For instance, Devlin Parent testified that he voted on March 25, 2022 during the morning session and that it took him approximately ninety-five (95) minutes to vote and Mian Asad went to vote at approximately 12:00 p.m. and completed the voting process in about two (2) hours. *See*, Tr. 1042:12 - 1042:25; Tr. 1189:19 - 1190:6.

Kevin Chu testified that although he had intended to vote during his lunch break on March 25, due to the long lines, he decided to leave and try again another time. *See*, Tr. 836:16 - 837:6. On March 28, 2022, Mr. Chu went to vote at 11:00 a.m. during his lunch break but saw a line that seemed too long for him, so he decided to return to vote. *See*, Tr. 838:2 - 838:14. Mr. Chu agreed that it was his personal choice not to wait on the line on March 25 or March 28 and that no one told him that he could not wait on the line or turned him away from the polls. *See*, Tr. 853:23 -

855:1. On March 29, 2022, Mr. Chu went again to vote during his lunch break at 11:00 a.m. and this time he went straight to the front of the line. *See*, Tr. 840:6 - 840:17.

Jasmine Gordon, similar to Kevin Chu, was going to vote on March 25, 2022, but due to the length of the lines, simply decided to vote on March 30, 2022 instead. Ms. Gordon did not testify to any type of long wait when voted. *See*, Tr. 1631:14 - 1632:13.

The testimony was inconsistent on whether voters actually even experienced line voting lines during the first session on March 25, 2022. Patrick Delancy also voted during the first session on March 25, 2022. He went out to vote around 11:30 a.m. - 12:00 p.m. *See*, Tr. 1227:18 - 1228:2. Mr. Delancy testified that he only waited on line for approximately forty-five minutes. *See*, Tr. 1228:3 - 1228:6. Noemi Abreu also voted during the first session on March 25, 2022. She went out to vote around 8:20 a.m. *See*, Tr. 1372:4 - 1372:15. Ms. Abreu completed the voting process in about 20 minutes. *See*, Tr. 1383:6 - 1383:7. Adina Goriva testified that when she went to vote during the evening session on March 29, 2022 that she only waited in line for approximately ten (10) minutes. *See*, Tr. 887:6 - 888:4. Matthew Cordova testified that he voted at about 9:00 a.m. on the third day of voting and that the entire process took him less than 10 minutes. *See*, Tr. 1284:25 - 1285:15. Robert Castellano voted in the morning session of the final day, March 30, 2022 at approximately 8:00 a.m. See, Tr. 1093:22 - 1094:7. Mr. Castellano testified that his entire voting experience only took a few minutes. *See*, Tr. 1139:17 - 1139:20. Gregory Purpura testified that he voted during the morning voting session on March 29, 2022. *See*, Tr. 727:25 - 728:3. Mr. Purpura testified that Amazon made it clear to him that he could vote on company time. *See*, Tr. 728:24 - 729:5. There was almost no line to vote when Mr. Purpura went to vote. *See*, Tr. 729:6 - 729:11.

Amarilis Villalongo testified that when she went to vote on Tuesday, March 29, 2022 there were no lines but she did not actually vote because she did not like the "attitude" of the Board agent who was handing her a ballot. When asked on direct examination what "attitude" discouraged Ms. Villalongo to vote, she testified "It's not what you say, it's how you said it. And she was like, the way she said it felt like as if she already knew that the ALU had won." *See*, Tr. 2905:25-2806:4. Further on cross examination when asked to expand on her answer, Ms. Villalongo testified: "Attitude meaning, I believe they know that I wasn't with the ALU because I had a shirt one time at my job that says Vote No." *See*, Tr. 2821:3 – 2821:5. Ms. Vilalongo's confusion was further highlighted when she admitted that she did not know that the government was supervising this election and that she did not know whether the agents from the NLRB had ever seen her wearing her "Vote No" shirt the week before the election. *See*, Tr. 2821:9-2821:25. The witness also conceded on cross examination that she voluntarily decided not to vote, nobody told her not to vote and that she could have returned for a different voting session, but chose not to vote on her own. *See*, Tr. 2822.

With respect to Objection 7, the testimony reveals that about 30 minutes into the first voting session, the NLRB changed the way the voting line was set up so that once voters entered the voting tent, instead of there being one (1) long snaking line, the line broke into three (3) segments which coincided with the alphabetical manner in which the check-in tables had been broken down (A - F; G - N; O- Z). *See*, Tr. 607:2 - 607:13; *See also*, Tr. 612:1 - 612:4; Tr. 625:11 - 625:19; Tr. 786:7 - 786:19; Tr. 1051;14 - 1054:12.; Tr. 1286:16 - 1286:25.

This change enabled the voting lines to move faster. *See*, Tr. 612:15 - 612:17; 1190:14 - 1190:22; *See also*, Tr. 1382:22 - 1383:7; Tr. 1388:3 - 1388:14. As a result of this change, NLRB agents were able to split voters up by last name so that all three voting tables inside the tent were

being used more efficiently. This meant that as voters came closer in proximity to the voting tent they were split into 3 separate lines. *See*, Tr. 748:2 - 748:16; Tr. 749:11 - 750:20; Tr. 754:5 - 754:17; Tr. 787:3 - 787:11; Tr. 788:13 - 788:19.

Ms. Grajeda observed that at one point NLRB agents were asking for "voters on the A line" to enter the tent. See, Tr. 801:9 - 801:11. Noemi Abreu made similar observations. *See*, Tr. 1382:13 - 1382:24. Dio Sanchez, an observer for three (3) sessions, did not see an NLRB agent turn away a single voter as a result of the alphabetical breakdown of the lines or for any other reason. *See*, Tr. 1356:14 - 1356:21; Tr. 1357:10 - 1357:17.

Regional directors have discretion to determine how elections are conducted. *See*, *V. LaRosa & Sons*, 121 NLRB 671, 673 (1958); *Independent-Rice Mill*, 111 NLRB 536, 537 (1955). Exercising discretion necessarily involves predictions about turnout, weather, and other contingencies. Elections are not and should not be overturned when they do not proceed exactly as planned. Even when Board agents' conduct in an election is not "optimal," the Board will not overturn an election when a party has failed to create "reasonable doubt as to the fairness and validity of the election." *Trustees of Columbia University in the City of New York*, 365 NLRB No. 136, slip op. at n.2 (2017). *See also San Diego Gas & Electric*, 325 NLRB 1143, 1144 (1998); *1621 Route 22 West Operating Co. v. NLRB*, 725 F. App'x 129, 140 (3d Cir. 2018); *Garda CL Atlantic, Inc. v. NLRB*, 2018 WL 2943941 (D.C. Cir. May 22, 2018). "The objecting party's showing of prejudicial harm must be more than speculative to establish that a new election is required." *Guardsmark, LLC*, 363 NLRB No. 103, slip op. at 4 (2016).

Amazon's allegations, even if proven, do not come close to satisfying its burden of proof that there was any interference with voter free choice in the manner in which the election was

staffed or conducted by the Region. Its claims in these Objections are nothing more than speculative, especially in a context where the Amazon Labor Union prevailed by 523 votes. As the Board observed in *Newport News Shipbuilding & Dry Dock Co*., 239 NLRB 82, 89-90 (1978), "These objections illustrate the unanticipated problems which often arise in the conduct of large elections. . . . Although reasonable people can differ whether the decision of those Board agents was the best one, our task is to decide whether it amounted to an abuse of discretion. We think not."

D. Objection 8 Must Be Overruled As The *Employer* Failed to Control the Media's Presence And Failed to Establish That The Presence of Media Created an Atmosphere of Fear and Reprisal

Objection 8 states as follows:

> **Objection 8:** The Region failed to protect the integrity of its procedures when it failed to control media presence in and around the voting area.

The thrust of Objection 8 is that there was media present "in and around the voting area" and that media agents filmed employees and asked employees how they intended to vote. As a matter of law, this conduct, even if true or widespread, is not objectionable under the heightened standard applicable to third party conduct. Conduct by third parties, such as the media, is only objectionable if it "creates a general atmosphere of fear and reprisal that renders a fair election impossible." *Accubuilt, Inc*. 340 NLRB 1337, 1337 (2003). *See also Millard Processing Services v. NLRB,* 2 F.3d 258, 261 (8th Cir. 1993); *Overnite Transp. Co. v. NLRB*, 140 F.3d 259, 265-268 (D.C. Cir. 1998) (applying third-party standards to objections based on video-taping by union supporters on the day of election).

Any argument by the Employer that the media violated the *Milchem* rule must also fail. *See Milchem, Inc*. 170 NLRB 362 (1968). *L.C. Cassidy Son, Inc. v. N.L.R.B*, 745 F.2d 1059, 1063

(7th Cir. 1984) ("*See NLRB v. Newton-New Haven Co.,* 506 F.2d 1035, 1037 (2d Cir. 1974) ("[T]he rationale of *Milchem* is to eliminate the last-minute advantage given **a party** who intrudes upon the privacy of the employee while he is in the polling place or standing on line to vote."). (*emphasis added) Cf. Midwest Stock Exchange v. NLRB,* 620 F.2d 629 (7th Cir.) ") Thus the Board has specifically held that the *Milchem* rule does not apply to third parties, such as the media. *Rheem Mfg. Co*., 309 NLRB 459, 463 (1992) (not applying *Milchem, Inc*., 170 NLRB 362 (1968)). *See also Yukon Mfg. Co.*, 310 NLRB 324, 330 (1993); *Crestwood Convalescent Hospital*, 316 NLRB 1057, 1057 (1995).

Amazon's reliance on the media presence within the "no electioneering" zone as the basis for Objection 8 is misplaced. By its definition, the "no electioneering" zone is an area that the Board will not permit any party to campaign to influence the results of an election. The media is not a party to the election. Moreover, not one witness described the presence of the media as synonymous with "electioneering" despite Amazon's attempts to conflate the two. No evidence was placed in the record by the Employer that any member of the media, none of whom were established as agents for the Petitioner, engaged in any attempt to influence a voter's vote. *See, e.g.,* Tr. 528:20 - 529:14.

In explaining where **the parties** could not electioneer, Barbara Russell, the Director of Employee Relations testified: "We explained that we had put barriers up to the left and to the right of the tent in both that middle drive lane and in the drive lane closest to the facility so that vehicles could not travel into the area near the tent. The parties discussed, and Ioulia indicated, that those barriers provided a reasonable line by which we could establish the no-electioneering zone." *See* Tr. 2277: 7-14. On March 25, 2022 during the pre-election conference, Russell claimed that Kate Anderson, a Board Agent from Region 29, said that Region 29 would police the media "between

the barricades on the left and the barricades on the right and the two drive lanes that we had blocked." *See* Tr. 2295:16 - 2296:5. At no point in her testimony did Ms. Russell explain or describe how the media was electioneering. She also admitted that the Employer was responsible for handling the media so when she observed a member of the media approach the voting tent she "went up and greeted that individual, introduced myself, inquired if he was a member of the media, asked that he stand to the side while I called a member of our public relations department to come out and speak with him." *See* Tr. 2296:6 - 2296:15.

Later, Russell also testified that Counsel for Amazon, Amber Rogers "asked that the Board do more to effectively police the voting area and keep the media out." *See* Tr. 2332:6 - 2332:8. Region 29 "responded only by reiterating that they were doing it the best that they could. Ms. Rogers asked again that the Board add additional agents to help with the policing. Ioulia answered that that would not be necessary and that they would not be taking that step." *See* Tr. 2332:11 - 2332:16. Neither Amber Rogers nor Barbara Russell explained to the Region nor to the Hearing Officer how the media was engaged in electioneering. When Russell, who was never asked on direct examination to explain her understanding of "electioneering", was unsatisfied with the answers she received from Board Agent Fedorova, Russell and counsel for Amazon, Amber Rogers, approached Fedorova's supervisor, Assistant Regional Director Teresa Poor: "Ms. Poor said that, with respect to the media, the Board agents were doing the best that they could and there was only so much that they could see and did not agree to take any additional steps to protect the voters from the media in that voting and electioneering area." *See* Tr. 2335:12 - 2335:24. Ms. Russell, also admitted that Employer's counsel, Amber Rogers reiterated in her call to Agent Poor "that the company was going to send a member of its public relations department out to greet any media that we became aware were on our property solely for the member of the public relations

team to direct the media off our property." *See* Tr. 2336:7 - 2336:12. During cross examination, Ms. Russell was forced to admit that prior to March 25, 2022 "It was my understanding that we, Amazon, did want to send representatives of our public relations department to interface with any members of the media who are on the property solely to instruct them to leave the property." *See* Tr. 2365:8 - 2365:12, ALU Exhibit 6. Despite making the representation to the Region and to Petitioner that it would monitor and interface with members of the media prior to March 25, 2022, Amazon began improperly asking the Region to do so on March 25, 2022 and in bad faith used this as a basis for an objection about media presence in and around the voting area in an illegitimate attempt to overturn an election won by a margin of more than 500 votes. This is especially egregious because both counsel of record for the Employer in this matter made representations to the Region and Petitioner that it would handle the media presence, yet failed to do so and then used that failure as a basis for making an electioneering Objection.

Despite Amazon's attempts to cast the Region as the party responsible for controlling the media, it is unrefuted that the election took place on Amazon's property and that Amazon had taken responsibility for controlling the media prior to the election taking place. Specifically, Amazon agreed and communicated that it would use their public relations team to directly engage with media that the Employer wished to leave its property. *See*, Tr. 526:7 - 526:18; *See also,* Tr. 535:11 - 535:16; ALU Exhibit 6. According to voters that stood on the line during the first voting session, Amazon Public Relations representatives failed to engage with the media. *See*, Tr. 791:20 - 792:21. Only one voter testified that they saw the Employer's Public Relations staff attempt to engage with the media. *See*, Tr. 1271:7 - 1271:19. In the one instance where Amazon did directly engage with the media, the media promptly left the property and there was no testimony of media electioneering. *See*, Tr. 1290:21 - 1292:2.

A party to an election case is ordinarily estopped from relying on its own misconduct as objectionable. *B. J. Titan Service Co*., 296 NLRB 668, 668 fn. 2 (1989); *Republic Electronics*, 266 NLRB 852, 853 (1983); see also Rules Sec. 102.62(d), (e) and 102.67(k), (l) (applying estoppel principles to voter list service failures and notice of election posting or distribution failures). By tailoring an Objection based on Amazon's own failure to comply with its counsel's agreement to engage with the media and then for the Employer to fail to connect the media's presence to electioneering in violation of the Board's *Milchem* rules, is bad faith.

Moreover, Amazon failed to establish how laboratory conditions were disturbed to impinge on employee free choice. Natasha Grajeda testified that although she was photographed while she was standing in the voting line, she only came to realize this ***after*** she had voted. *See*, Tr. 759:7 - 760:10. Ms. Grajeda was wearing a blue "VOTE NO" shirt as she waited on the line outside. *See*, Tr. 784:10 - 784:17. Despite the presence of the media, Ms. Grajeda remained on the voting line. *See*, Tr. 791:4 - 791:13. The witness did not testify that the media photographer engaged in any electioneering or conversation with her. Nonetheless, the Employer failed to establish any agency relationship between the media photographer and the Petitioner.

Patrick Delancey testified that he voluntarily spoke with the media and it did not at all prevent him from voting. *See*, Tr. 1275:2 - 1275:24. The Employer failed to elicit any testimony that Mr. Delancey's voluntary conversation with the media constituted electioneering nor that the media person he spoke to was an agent of the Petitioner.

Adina Goriva voted on March 29, 2022 despite having previously seen photos of voters standing in line in the "Staten Island Advance" earlier during the voting period. *See*, Tr. 888:5 - 890:4. This testimony shows that the media coverage had no effect on voters.

Devlin Parent, while not pleased about the presence of the media, waited on line to vote anyway. *See*, Tr. 1059:13 - 1059:17. However, Mr. Parent also noted that many other people on the line appeared to be posing for photos to be taken by the media. *See*, Tr. 1059:21 - 1060:3. Again there is no testimony that the media that was present were agents of the Petitioner nor was any electioneering by the media described. Mr. Mian Asad testified very similarly: he didn't really want to speak with the media, but he voluntarily chose to do so and it did not cause him to leave the line or otherwise not vote. *See*, Tr. 1222:10 - 1222:22; Tr. 1223:21 - 1224:2. The employer failed to describe how the media's presence prevented any voter from exercising their free choice.

Of all its witnesses presented in support of Objection 8, perhaps the most incredible was Amarilis Villalongo who testified that on March 25, 2022 when she came outside JFK8 during her break she saw Brett Daniels, the ALU Director of Organizing, with a news camera on his shoulder videotaping the voting line. *See* Tr. 2809:10 - 22 She failed to describe any conversations that she witnessed Mr. Daniels allegedly engaged in with voters. She continued testifying on cross examination that when she allegedly saw Daniels recording the line with the news camera, she began an Instagram live video to record Mr. Daniels activities, however when she was asked to produce this Instagram live video, conveniently the video was no longer available. *See* Tr. 2809:23-2810:13. On cross examination, Ms. Villalongo admitted that she gave another video that **she** took to counsel for Amazon, who produced it on re-direct, but that video just shows voters in line on Monday, March 28, 2022, not Petitioner electioneering or Petitioner acting as media. Ms. Villalongo's account was not corroborated by any other witness, nor was it corroborated by any video evidence; her testimony in this regard should not be credited.

After the first voting session, Amazon, with the approval of the NLRB installed an additional tent for voters to queue up in as well as a 6 ½ foot tall mesh covered fence to further

obscure voters from members of the media. *See*, Tr. 391:23 - 393:14; Emp. Ex. 672. There was never any testimony that the purpose for the fence covering was to prohibit electioneering by the media.

In fact, the testimony revealed that Amazon itself engaged in surveillance and coercion during the first day of the election by using the Regional Loss Prevention Manager for all Fulfillment Centers in New York and Connecticut, Joe Troy (a past Loss Prevention manager from JFK8), to accompany the Public Relations team as an "escalation point" at or near the voting tents while the polls were open and voters were in line, to control the media. He testified that a joint decision was made with counsel for Amazon, Amazon's Employee Relations Team Members and himself, for Mr. Troy to provide assistance to control the media on March 25, 2022. *See* Tr. 1922:11 - 1922:19. This is true, despite the fact that Amazon had clearly agreed to ***not*** use its loss prevention personnel to engage with the media during the election. *See*, Tr. 528:20 - 529:14. In fact, Ms. Barbara Russell, the Director of Employee Relations testified that "My understanding is that members of our management team were not to go anywhere near the voting tent, and were not to go outside and interact with the media. …[but] I wanted Mr. Troy to accompany our public relations team for security purposes." *See* Tr. 2365:20 - 2365:23, 2366:19 - 2366:20. Mr. Troy himself admitted during his own direct that Verena Gross was onsite at JFK8 that day to engage with the media because "we made a decision to have folks that were not associated with JFK8 in any way be there to respond during the election times… it wasn't going to have the appearance of surveillance." *See*, Tr. 1683:10 - 1683:23. But then the decision was made with the blessing from counsel for the Employer to send the Regional Loss Prevention Manager who had previously worked at JFK8 in the recent past, even though he admitted he would be able to easily identify

voters, and even as it was clearly apparent that his presence would interfere with the free choice of voters by constituting surveillance of employee Section 7 rights.

On that first day of the election, Verena Gross from the Amazon Public Relations Department was accompanied by Mr. Troy to confront the media and ask them to leave Amazon's private property. Specifically, Mr. Troy testified that Ms. Gross was responsible for engaging with the media near the polls and Mr. Troy was responsible for being an "escalation point" in case the media refused to comply or became agitated. *See,* Tr. 1926-1931. The Employer and its counsel chose Mr. Troy for this role despite the fact that the witness admitted that his picture was up on multiple video screens in the "Green mile" so that employees would "be comfortable knowing and understanding who all of the leaders are in the facility…" *See* Tr. 1935:6 - 1935:8. Mr. Troy testified for certain that his photo identifying him as a member of the Senior Leadership Team at JFK8 was present from September 2020 to June 2021 and he does not know if his photo was still present on the screens in the Green Mile from June 2021 to March 2022. However, Mr. Troy also admitted that from September 2020 to June 2021 employees at JFK8 identified him as an investigator on behalf of management who interviewed employees for misconduct and would also recommend discipline against employees. *See* Tr. 1939:15 - 1939:23 On cross examination, Mr. Troy was forced to admit that while he was acting as the "escalation point" for the Employer's Public Relations team on the first day of polling, he saw people he could identify who were in line to vote. *See* Tr. 1936:3 - 1936:14; *See also*, Tr. 1781:21 - 1782:16; Tr. 1783:16 - 1783:19. In fact, on direct examination and later confirmed on cross examination, Mr. Troy testified that he had approached the first member of the media within 25 yards of the voting tent, the second member of the media within 10 feet from the voting tent and a third member of the media within 5-6 feet of the voting tent. *See*, Tr. 1781:1 - 1781:13; Tr. 1782:17 - 1782:22; Tr. 1784:8 - 1785:7. Mr.

Troy testified that he came in such close proximity to the voting tent on March 25, 2022 during polling hours even though he knew that being a member of management in direct view of the voters could affect the integrity of the election. *See* Tr. 1943-1947; *See also*, Tr. 1785:20 - 1785:23. Joe Troy also testified that during the evening voting session of March 25 that he conducted "walk throughs" of the voting area every two (2) hours and saw voters on the line each time. *See*, Tr. 1788:14 - 1789:2. There was no testimony that counsel for Amazon ever told Mr. Troy to not surveil voters nor informed the Region or Petitioner that it would be using members of its senior management team to engage with the media within feet of the voting tent.

Amazon cannot evade its high burden to show that voters were not able to exercise their free choice to vote in this election merely by casting Objection 8 as against the Region for permitting the media's third-party conduct, when it is well established that the Employer agreed to engage with the media. Moreover, the Employer failed to establish that the media members present at the election that Troy and Gross failed to engage with were agents of the Petitioner. Finally, the Employer failed to demonstrate that the media presence even constituted electioneering. The third-party media's conduct was not objectionable, thus there is no grounds for overturning the election based on Objection 8.

E. The Employer Failed to Produce any Evidence of Loitering or Electioneering by the Petitioner

Although argument I of this brief addresses the Objections directed at the Region, the Employer put forward two objections in addition to Objection 9, which allege similar conduct and are similarly baseless such that the Petitioner will address all three objections in this section of the brief.

Objections 9, 23 and 25 state as follows:

> **Objection 9:** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it allowed non-employee Petitioner President Smalls to loiter around the polling location and within the "no-electioneering zone" established by the Region on multiple occasions during polling times, where he was able to observe who participated in the election.
>
> **Objection 23:** On March 25, Petitioner's President Christian Smalls posted to his social media accounts a video of himself standing outside the voting area over 20 minutes after voting began and after he had told certain employees that the Petitioner would know how they voted. Employees viewing a video of the Petitioner's President appearing to stand outside the polling area while the polls were open reasonably tended to coerce and intimidate voters and potential voters and lead them to believe that the Petitioner and Mr. Smalls was or would surveil them. Mr. Smalls' social media post also reasonably tended to create the impression with voters that the Board supported Petitioner in the election, as it failed to properly police and/or took no actions to remove him from the "no-electioneering zone" established by the Board.
>
> **Objection 25:** Petitioner's officials, agents, and supporters, including but not limited to non-employee Petitioner President Smalls and non-employee Gerald Bryson engaged in objectionable conduct, including loitering in the "no-electioneering zone" established by the Board and/or within view of the polling area while polls were open, creating the impression among employees that the Petitioner was surveilling the polling area, and otherwise engaging in electioneering. This conduct reasonably tended to coerce and intimidate voters and potential voters.

As noted above, Objection 9 alleges that Region 29 failed to properly police the "no-electioneering zone" as evidenced by the allegation that Petitioner President Chris Smalls was permitted to "loiter" in the no-electioneering zone. Objection 23 is almost the same as Objection 9, but it is instead framed as causing an impression of surveillance based on Mr. Smalls' social media posts that employees might "believe" President Smalls is "loitering in the no-electioneering" zone. On the other hand, Objection 25 essentially complains of "loitering" and "electioneering" by Petitioner's agents, supporters or "non-employees" in the "no-electioneering" zone and/or "within view of the polling area."

In determining whether electioneering warrants an inference that it interfered with employee's free choice, the Board considers (1) the nature and extent of electioneering, (2) whether it was conducted by a party or employees, (3) whether the conduct occurred in a designated no electioneering area, and (4) whether the conduct contravened instructions of a Board agent. *See Boston Insulated Wire Co*., 259 NLRB 1118, 1119 (1982); see also *J. P. Mascaro & Sons*, 345 NLRB 637, 638 (2005). In the event there is not a designated no electioneering area, the Board will treat the area "at or near the polls" as equivalent for the purposes of this standard. *See Pearson Education, Inc.*, 336 NLRB 979, 979–980 (2001) (citing *Bally's Park Place, Inc*., 265 NLRB 703 (1982)).

Board precedent, endorsed by the Sixth Circuit, holds that "[p]resence alone, in the absence of evidence or coercion or other objectionable conduct, is insufficient to warrant setting aside an election." *Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974); *C & G Heating & Air Conditioning, Inc.*, 356 NLRB 1054, 1054 (2011) (upholding election after union representative sat in his truck and observed entrance to polling area for half the time polls were open); *Lowe's HIW, Inc.*, 349 NLRB 478, 478-79 (2007) (upholding election after employer's agent held the door open for voters entering the polling area for at least twenty minutes and later waited outside office where voting was taking place). Indeed, Board regulations provide that union representatives may observe election proceedings. 29 CFR § 102.69(a)(5).

The Board has made clear that the mere presence of union representatives in the vicinity of the polling area, without more, is not objectionable. *See Station Operators*, 307 NLRB 263 (1992); *see also C & G Heating & Air Conditioning, Inc.*, 365 NLRB No. 133 (2011). Indeed, the Board has affirmed that both union and employer representatives may observe election proceedings. *See Breman Steel Co.*, 115 NLRB 247 (1956).

1. Objection 9 is Legally Deficient and Not Supported by the Evidence

Objection 9, is directed at Region 29. Essentially, Objection 9 argues that the Region ``failed to protect the integrity and neutrality of its procedures…" when it allowed President Smalls to "loiter around the polling location and within the "no-electioneering zone" established by the Region on multiple occasions during polling times… where he was able to observe who voted" As Petitioner argued in its motion to dismiss, the mere act of "loitering" without more is *per se* not objectionable conduct. Thus, it cannot be objectionable even if it were true, which it is not. The claim that voters had the impression that the Board was not a neutral party because of Mr. Smalls' "loitering" is totally devoid of any merit.

First of all, under any construction of the operative facts, Region 29 is at most responsible for policing "electioneering" from occurring in the "no-electioneering" zone. Region 29 certainly has no responsibility for the area "around the polling location" that is not within the "no-electioneering zone" nor do they have any responsibility to prevent "loitering" that does not constitute "electioneering;" thus, the portions of Employer's Objection 9 related to Mr. Smalls' alleged presence "around the polling location" but not in the "no-electioneering zone" as well as his "loitering" as opposed to "electioneering" should be disregarded. *Cf., Bally's Park Place, Inc.*, 265 NLRB 703 (1982) (*holding* that in the absence of a designated "no-electioneering zone" the area "**at or near the polls**" is the area for which the Board applies strict rules against electioneering). *(emphasis added).*

In any event, as explained *supra,* the mere presence of Mr. Smalls "around the polling location" is not objectionable conduct. The mere presence of Mr. Smalls in the "no-electioneering" zone would be similarly non-objectionable for the same reasons cited, *supra*. Thus, even if Mr.

Smalls was present in the "no-electioneering zone" (a fact which the Employer has failed to establish), Region 29 would not be responsible for asking Mr. Smalls to leave unless he had been electioneering.

The "no-electioneering" zone established by Region 29 was an area in the parking lot directly in front of JFK8 that consisted of the two (2) closest drive lanes that ran parallel to the JFK8 facility bounded on either side by the closest drive lanes running perpendicular to the main entrance of the facility. *See*, Tr. 2294:11 - 2302:21; Emp. Ex. 695-E. **Although they attempted on several occasions, Amazon failed to produce a single witness that actually placed President Smalls in the "no electioneering" zone during the times the polls were open, much less witnessing actual electioneering by him.**

Voter Karen Martinez testified that while waiting to vote on March 25, 2022 between 9:45 am and 10:00 am she saw President Smalls 10 -15 or 15-20 feet away from the entrance to the voting tent for less than three (3) minutes. *See*, Tr. 1999:21 - 2007:3. Fifteen to twenty feet away from the Entrance to the tent in the direction described by Ms. Martinez is an area that is clearly outside of the "no-electioneering" zone established by Region 29.

While Voter Jeanne Cancellor testified that she saw President Smalls outside of the voting tent for five minutes on March 25, 2022 sometime before 11am while she was in the line to vote, her testimony lacked credibility and should be disregarded. *See* Tr. 2169:2 - 2172:11. Ms. Cancellor testified that during that five minutes President Smalls "was standing next to the cameraman" who was trying to take her photograph and that she then proceeded inside the voting tent. *See* Tr. 2171:10 - 2172:11; Tr. 2180-2181. Notwithstanding the five (5) minutes that Ms. Cancellor testified that she observed Mr. Smalls, on cross examination Ms. Cancellor was

completely unable to describe any of President Smalls' clothing or accessories that he was wearing when she allegedly saw him on March 25, 2022. *See* Tr. 2178:1 - 2179:5. Incredibly, she also was unable to describe what the cameraman looked like that she had testified was standing next to Mr. Smalls for that five (5) minute period. *See* Tr. 2181:8 - 2181:12. Finally, on redirect, Ms. Cancellor placed an "X" at the location where she had seen President Smalls on March 25, 2022 for 5 minutes next to the entrance of the tent. *See*, Emp. Ex. 695-B; Tr. 2183:21 - 2185:11. Based on Ms. Cancellor's placement of the "x," Mr. Smalls would have been located ***behind*** the voting tent and thus not actually visible to voters on the line. In any event, even if Mr. Smalls was present in that location and visible to Ms. Cancellor, that particular location was still outside of the "no-electioneering" zone. *See,* Emp. Exs. 695-B, 695-E.

The employer also elicited testimony from voter Taheera Aluqdah. Ms. Aluqdah was either mistaken or confused regarding the location of Mr. Smalls' vehicle on March 25, 2022. Ms. Aluqdah testified that she saw President Smalls in his "black truck" sometime between 2:30 and 2:45PM parked outside of the breakroom, approximately 1000 feet away from the entrance of the voting tent. Clearly, 1000 feet from the voting tent is nowhere near the "no-electioneering zone."

Ms. Aluqdah testified: "So he was, like, parked in the fire zone, I guess, where the lines are at, outside there." *See* Tr. 2220:13 - 2220:24; Tr. 2251:13 - 2251:17; *See also,* Emp. Ex. 695-D; ALU Ex. 17. A review of Emp. Ex. 695-D in conjunction with the testimony of Barbara Russell and Emp. Ex. 695-E demonstrates that Ms. Aluqdah placed President Smalls in his vehicle in an area that had been blocked off by the placement of orange barriers. *See,* Emp. Exs. 695-D, 695-E, ALU Ex. 17; Tr. 2294:11 - 2302:21. There is no possible way that President Smalls could have driven his "black truck" into the area that witness Aluqdah testified to. Even more so, a review of ALU Ex. 17, upon which Ms. Aluqdah drew her diagram of where the tent was and where the

voting line was, shows that she has clearly placed President Smalls' black truck right in the voting line making her testimony even more unbelievable.

Amarilis Villalongo was another witness lacking any credibility presented by the Employer in an attempt to support these baseless objections. Ms. Villalongo's testimony was that she saw five ALU supporters, to wit, Christian Smalls, Jordan Flowers, Jason Anthony, Brett Daniels and Tristan Martinez, on March 25, 2022, 25 feet from the tent, but she could not hear what they were saying. *See* Tr. 2791:3 - 2798:14. It is important to note, Jordan Flowers, Jason Anthony and Tristan Martinez are ***not*** agents of the Petitioner. Bizarrely, Ms. Villalongo then went on to identify Jordan Flowers as someone who she "thought was security" standing "inside the voting tent" and directing her what line to stand in. *See* Tr. 2816:7 - 2816:24. Clearly, Ms. Villalongo was confusing an NLRB agent for Jordan Flowers.

In any event, Ms. Villalongo's own direct testimony clearly established that the location Ms. Villalongo believed she observed these five (5) individuals was in fact outside of the "no electioneering zone." *See*, Tr. 2294:11 - 2302:21; Tr. 2799:1 - 2800:11; Tr. 2831:10 - 2831:15; Emp. Exs. 695-E, 695-H.

Finally, not a single witness testified to Mr. Smalls as engaging in any conduct which could be considered objectionable "electioneering." For these reasons Objection 9 must be overruled.

2. <u>There is No Factual Basis to Support Objection 23</u>

Objection 23 is the most preposterous of this trio of baseless objections. A careful reading of Objection 23 indicates that the Objection does not even allege that President Smalls ***actually*** was present "outside the voting area" while the polls were open, it only alleges that President Smalls "posted to his social media accounts a video of himself standing outside the voting area

over 20 minutes after voting began…" The evidence in fact bears that out. The video tweeted by President Smalls at 8:20 a.m. and retweeted by the Amazon Labor Union shortly thereafter clearly demonstrates that Petitioner President, who it is undisputed was present at the pre-election conference on March 25, 2022, was standing outside of the voting tent at a time when there were clearly ***no voters*** waiting to vote, approaching the tent, or exiting the tent. *See*, Emp. Exs. 227, 227-V, 229; Tr.. 588:14 - 588:18; Tr. 643:24 - 645:11; Tr. 646:3 - 646:7; Tr. 4376:13 - 4377:5. Obviously, the fact that a video is tweeted at 8:20 a.m. on March 25, 2022 does not mean that it was taken at 8:20 a.m., it means that it was taken at some time ***prior*** to 8:20 a.m. on March 25, 2022, presumably around the time of the pre-election conference on March 25, 2022. Employer's Exhibit 227-V fails to provide any evidence that the polls were open at the time that this social media video was taken.

It is truly absurd for Amazon to argue that "employees viewing a video of the Petitioner's President appearing to stand outside the polling area while the polls were open reasonably tended to coerce and intimidate voters and potential voters and lead them to believe that the Petitioner and Mr. Smalls was or would surveil them." In the year 2022, the average person who uses social media certainly understands that the time a video is tweeted out is not equivalent to the time a video is taken. Amazon presented ***no evidence*** from any witness who actually believed anything contrary nor did they provide any evidence that an employee might have believed the contrary. That is, Amazon presented no voters who testified to feeling coerced, intimidated or surveilled by the social media posting. Most importantly there is no evidence that watching President Smalls' video had any effect on the free choice of voters.

Even assuming, *arguendo,* the social media post of the video did cause a voter to believe that President Smalls was in fact standing outside of the voting area while the polls were open, and

in fact, even if that video was actually taken while the polls were open, such conduct is still not the basis of a valid objection. Again, the Board has made clear that the mere presence of union representatives in the vicinity of the polling area, without more, is not objectionable. *See Station Operators*, 307 NLRB 263 (1992); *See also, Harlan #4 Coal Co. v. NLRB*, 490 F.2d 117, 121 (6th Cir. 1974); *C & G Heating & Air Conditioning, Inc.*, 356 NLRB 1054, 1054 (2011) (upholding election after union representative sat in his truck and observed entrance to polling area for half the time polls were open); *Lowe's HIW, Inc.*, 349 NLRB 478, 478-79 (2007) (upholding election after employer's agent held the door open for voters entering the polling area for at least twenty minutes and later waited outside the office where voting was taking place). Indeed, Board regulations provide that union representatives may observe election proceedings. *See*, 29 CFR § 102.69(a)(5); *See also, Breman Steel Co.*, 115 NLRB 247 (1956).

Finally, the Employer failed to submit any evidence that the Petitioner told any employees that they would know how employees voted. Amazon never elicited testimony in this lengthy hearing with 50+ witnesses that President Smalls' social media posts "tended to coerce and intimidate voters and potential voters and lead them to believe that the Petitioner and Mr. Smalls was or would surveil them." Moreover any allegation that "Mr. Smalls' social media post also reasonably tended to create the impression with voters that the Board supported Petitioner in the election, as it failed to properly police and/or took no actions to remove him from the "no-electioneering zone" established by the Board" is pure fantasy that is further addressed under Objection 8. Objection 23 must be rejected as the Employer has completely failed to meet its burden of proof.

3. <u>There is No Evidence of Electioneering or Loitering by Any of Petitioner's Agents or Supporters in the "No-Electioneering" Zone or Otherwise "in and around" the Polls</u>

Objection 25, is similar to Objection 9, except this objection is directed at the Petitioner and the objection includes the conduct of not only Christian Smalls but also other "officials, agents and supporters" of the Petitioner[3]. This objection also claims that Petitioner "otherwise engag[ed] in electioneering."

As discussed *supra*, the testimony of Ms. Cancellor, Ms. Martinez, Ms. Aluqdah and Ms. Villalongo established that Mr. Smalls[4] was at most only seen "within view of the polling area" and ***not*** within the "no-electioneering zone," the latter which was much closer to the actual voting tent than an area "within view of the polling area."

In addition, Ms. Martinez also testified that when she saw President Smalls he was just standing there not talking to anyone and that his presence "actually didn't bother me at all." *See,* Tr. 2013:11 - 2013:12. Ms. Martinez also testified on cross examination that she never told anyone that she saw President Smalls at the polls when she voted. *See*, Tr. 2013:13 - 2013:16. Ms. Aluqdah similarly testified that seeing President Smalls had no effect on her ability to vote and she further testified that he never even exited his vehicle or interacted with any other employees. *See* Tr. 2246:13 - 2246:18; Tr. 2251:7 - 2151:12.

As discussed *supra,* although Ms. Aluqdah was certainly mistaken as to the location she saw Mr. Smalls in his vehicle, it is quite likely that Mr. Smalls was somewhere on the Amazon property during the timeframe testified to by Ms. Aluqdah. The first voting session concluded at approximately 2:45 p.m. at which time President Smalls was present for the post-election

[3] Arguably, unlike Objection 9, allegations that the Petitioner and its officials, agents and supporters were also loitering "within view of the polling area" as opposed to in the "no-electioneering zone" could conceivably support Objection 25, but only to the extent that "loitering within view of the polling area" is itself objectionable, which, as explained in detail herein, it is not.

[4] And in the case of Ms. Villalongo, additional agents and supporters of the Petitioner

conference. *See*, Tr. 362:23 - 363:8; 380:18 - 381:1; Tr. 2281:24 - 2282:1. Therefore, it is logical that Mr. Smalls was present somewhere on the Amazon property at this time and Ms. Aluqdah simply confused seeing Mr. Smalls at that location for another time she may have seen Mr. Smalls at that particular location.

In addition to being present for the post-election conference on March 25, 2022, Mr. Smalls was also present for the pre-election conference on March 25, 2022. *See*, Tr. 588:14 - 588:18; Tr. 643:24 - 645:11; Tr. 646:3 - 646:7. These facts are consistent with Kevin Chu's testimony that he saw Christian Smalls in the parking lot (**nowhere near the tent)** at approximately 11:05 - 11:10 a.m. as well as Joe Troy's testimony that he saw Christian Smalls in a vehicle across from the parking garage at around 11:00 a.m. *See*, Tr. 843:7 - 843:23; Tr. 873:1 - 873:11; Tr. 1709: - 1710:7; Tr. *See also,* Emp. Ex. 695.

Mr. Chu further testified that he had no idea if Mr. Smalls could see him or anybody else waiting in line to vote nor did he feel coerced or intimidated by virtue of having seen Mr. Smalls. *See*, Tr. 852:20 - 853:10; Tr. 873:13 - 874:9.

Stephanie Lopez testified that she saw Connor Spence standing casually outside of the voting tent exit around noon on March 30, 2022. *See* Tr. 2700-2701. On cross examination Ms. Lopez admitted that she had only "glimpsed" Mr. Spence, not long enough to even register what clothing he was wearing nor to see in which direction he was looking when she "glimpsed" him[5]. *See* Tr. 2718:3 - 2718:15. Furthermore, Ms. Lopez also admitted that she does not know what Mr. Spence was doing outside of the tent and conceded that he could have just finished voting himself. *See* Tr. 2736:25 - 2737:11. Matthew Cordova also testified that he saw Connor Spence just outside

[5] Thus, it is not even clear if Ms. Lopez actually saw Connor Spence at that day and time

of the voting tent at the time he voted, which was approximately 9:00 a.m. on Monday, March 28, 2022. *See*, Tr. 1285:3 - 1285:11; Tr. 1304:13 - 1304:24. Inasmuch as it is undisputed that Connor Spence worked at JFK8, and in fact would have been scheduled to work (and receive break times) during the very times that Ms. Lopez and Mr. Cordova claimed to have seen Mr. Spence, it is completely irrelevant that they may have seen Mr. Spence casually standing or walking through the parking lot or near the voting area (in the parking lot) during the times testified to. *See*, Tr. 4290:1 - 4290:10.

Again, the mere presence of Union representatives in or near the polling area is not in and of itself objectionable conduct. In fact, even if these Union representatives had engaged in conversations or otherwise interacted with the voters (for which there is absolutely no evidence) such conduct would ***still*** not be objectionable.

The Board has made clear that the mere presence of union representatives in the vicinity of the polling area, without more, is not objectionable. *See Station Operators*, 307 NLRB 263 (1992); *see also C & G Heating & Air Conditioning, Inc.*, 365 NLRB No. 133 (2011). Indeed, the Board has affirmed that both union and employer representatives may observe election proceedings. *See Breman Steel Co.*, 115 NLRB 247 (1956).

In addition to the above, Charlene Novoa, an Employer observer testified that on March 28, 2022, she witnessed Petitioner Observer Cassio Mendoza interact with voters: "He didn't say anything. It was a lot of facial expressions and hand movements." *See* Tr. 2881:22 -2881:23. When asked to describe the hand gestures and facial expressions, Ms. Novoa testified that it consisted of "[t]humbs up and big smiles. … like, three or four times …" *See* Tr. 2884:24 - 2885:2; Tr. 2885:23 - 2885:24. She went on to expound that on March 29, 2022, Cassio Mendoza

communicated with voters by, "facial expressions such as big smiles and general over happiness. … A certain enthusiasm that didn't seem necessary. … A certain friendliness." *See* Tr. 2888:17 - 25 - 2889:17. According to Ms. Novoa, on March 29, 2022 Cassio Mendoza did not make any thumbs up gestures, "just big smiles." *See,* Tr. 2902:11 - 2902:13. When confronted with the fact that as a part of the election procedures, observers were required to wear masks, Ms. Novoa testified that Mr. Mendoza did not wear a mask properly and had it pulled down to his chin, but that she did not make anyone aware of this fact during the election. *See* Tr. 2903:1 - 2903:8; Tr. 2904:14 - 2904:22.

Not only did Mr. Mendoza credibly deny failing to properly wear a mask during the time he served as an observer, Mr. Mendoza also credibly explained that the hand gestures he used were to address what he saw as possible confusion by the voter as to where to go next. He said he was waving voters over to the proper table and giving thumbs up gestures to voters in order to signal to them that they understood and were approaching the correct table. *See*, Tr. 5024:5 - 5025:22; Tr. 5028:16 - 5028:25. These are almost the precise gestures that Ms. Novoa also admitted to giving to voters on her cross-examination but they were not in the context which Mr. Mendoza put them. *See*, 2921:1 - 2921:18.

Although the Board has found that a Union observer giving a "thumbs-up" gesture could be considered electioneering at the polls when combined with additional objectionable conduct, the single case wherein a "thumbs-up" gesture resulted in an election being set aside is distinguishable on multiple grounds. *Compare, Brinks, Inc.*, 331 NLRB 46 (2000) (*holding* that election should be set aside where Union observer gave "thumbs up" signal to voters after being admonished by Board Agent ***and*** specifically telling four (4) employees to vote for the Union, ***and*** at least one (1) of those employees told other employees what the observer had said) *with U-*

Haul Co. of Nevada, Inc., 341 NLRB 195 (2004), *Enfc'd*, 490 F.3d. 957 (D.C. Cir. 2007) (*holding* that the election ***should not*** be overturned where the union observer was giving "thumbs up" and "smiles" to voters unaccompanied by any verbal exchange, the observer was not admonished by a Board Agent concerning this conduct and no one reported this conduct to a Board Agent). *See also, e.g., Downtown Bid Services Corp.*, 2010 NLRB LEXIS 89 (2010) (*holding* that employer objection should be overruled where a Union observer was making facial gestures at voters and attempted to embrace another voter who left the tent without voting as a result).

In this case it is undisputed that Mr. Mendoza did not accompany the "thumbs-up" gesture with any verbal communication, Mr. Mendoza's behavior was not reported to the Board, nor was Mr. Mendoza ever admonished by a Board Agent to cease his alleged conduct. *See*, Tr. 2881:16 - 2881:18; 2887:17 - 2887:22l Tr. 2899:14 - 2899:21. This is despite the fact that the voting tent was relatively quiet on the evenings of March 28 and 29 and such conduct would have been easily observed by a Board Agent in the tent. *See*, Tr. 2899:14 - 2899:21; Tr. 5022:24 - 5023:19.[6]

For all of the above reasons, Objections 9, 23 and 25 should be rejected as a basis to overturn this election.

F. Region 29 Did Not Disparately Enforce The Wearing of Paraphernalia

[6] No testimony regarding other alleged electioneering was elicited, but even if it had been, the Board has found various types of electioneering conduct unobjectionable. See, e.g., *J.P. Mascaro & Sons*, 345 NLRB 637, 638 (2005)(conversations that took place outside the front entrance, away from any no-electioneering zone, that did not violate any Board agent instructions); *American Medical Response*, 339 NLRB 23, 23 fn. 1 (2003)(pro-union poster affixed to tree 100 feet from polling area and distributing pro-union flyers 50 to 80 feet from polling area); *Del Ray Tortilleria*, 272 NLRB 1106, 1107-1108 (1984)(union organizer shaking hands and speaking briefly with voters outside the polling place); *Boston Insulated Wire*, 259 NLRB at 1118-1119 (passing out leaflets and speaking to employees as they entered building where glass-paneled doors effectively insulated voters from the electioneering); see also *Marvel International Security Service*, 173 NLRB 1260 (1968)(union representatives conversed with voters at foot of 10-foot staircase leading to second floor where polling area was 20 to 25 feet down a hallway, beyond no-electioneering area established by Board agent); *Harold W. Moore & Son*, 173 NLRB 1258 (1968)(conversations taking place 30 feet from building entrance, which was itself 30 feet from polling area); *Sewanee Coal Operators' Assn.*, 146 NLRB 1145, 1147 (1964) (persons wearing pro-union placards circulated about the voting line outside of polling area and Board agent had not designated no-electioneering area); *NLRB v. Le Fort Enterprises, Inc.*, 791 F.3d 207, 213-214 (1st Cir. 2015) (electioneering and name calling engaged in by employees outside of any no-electioneering area which could not be heard in polling place not objectionable).

Objection 10 states as follows:

> **OBJECTION 10:** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it directed voters to cover up "Vote NO" shirts, but allowed other voters to wear Petitioner shirts and other Petitioner paraphernalia in the polling area.

The essence of this Objection is that the Board treated voters who were wearing "Vote No" T- shirts differently than those who had Petitioner's paraphernalia. First of all, the Board has held that wearing stickers, buttons, and similar campaign insignia by participants as well as observers at an election without more, is not prejudicial. *R. H Osbrink Mfg. Co*., 114 NLRB 940, 942 (1955); see also *Furniture City Upholstery Co*., 115 NLRB 1433, 1434-1435 (1956). Precedent is clear that observers wearing buttons or other insignia merely bearing the name of their union is not prejudicial to the fair conduct of an election. *Electric Wheel Co*., 120 NLRB 1644, 1646 (1958). Viewing the identity and special interests of employer observers as not reasonably presumed to be less well known than that of union observers, the Board holds that the impact on voters is not materially different "whether the observers wear pro-union or anti-union insignia of this kind." *Larkwood Farms*, 178 NLRB 226 (1969) (observer wearing "Vote No" hat not objectionable); see also *Fiber Industries*, 267 NLRB 840, 850 (1983) (appearance of words "yes" or "no" in polling area, without more, not grounds to set aside election); *Delaware Mills, Inc.*, 123 NLRB 943, 946 (1959) (*overruling* objection based on employee, who, because her vote was challenged, was required to sit at polling place wearing union T-shirt and "Vote Yes" button and allegedly waved and smiled at other voters). However in the instant election the testimony bears out that logos from both parties (the ALU box with 3 fists and the Amazon "smile") were present in the polling area, as were "Vote No" t-shirts in large font and "Vote Yes" lanyards in small font.

Based upon the operative law, it is ***irrelevant*** whether or not voters or observers were wearing pro-union or anti-union insignia of any kind while in the voting tent. The only questions to be analyzed are: "Did the Region direct voters to cover up "Vote NO" shirts but allow[ ] other voters to wear Petitioner shirts and other Petitioner paraphernalia in the polling area[7]," and, if the Region did in fact do this, "[d]id the Region fai[l] to protect the integrity and neutrality of its procedures and creat[e] the impression of Board assistance or support for the Petitioner" by virtue of that conduct. The answer to both questions is a resounding no.

First of all there is substantial testimony in the record that voters were directed to cover up not just anti-union paraphernalia but pro-union paraphernalia as well. For instance, Cassio Mendoza, an observer at six (6) of the ten (10) voting sessions testified that Board Agent Ioulia Fedorova asked voters on numerous occasions to put away their ALU lanyards, and that voters were complying with this instruction. *See*, Tr. 5018:17 - 5021:13. Additionally, Employer witness, Natalie Monarrez, who brought a sign to the voting tent on which she had written, *inter alia,* that she would be voting no, also stated that a male NLRB agent made an announcement to everyone that nobody was allowed to have any signs or any T-shirts that said anything at all about the election. It needed to be put away. Or it would be taken away. Tr. 4003:13 - 4003:17. She further stated she saw all people complying with the NLRB agent's admonition. Tr. 4003:22 - 4003:24. Furthermore, Ms. Monarrez specifically stated when she went to vote she did not see any people wearing ALU paraphernalia inside the tent. Tr. 4004:14 - 4004:18. Gregory Purpura

[7] And even if the answer was "yes", operative case law holds that without further proof that the conduct by the Board Agents actually "had an impact on employees voting" the objection should still be overruled. *See, Firestone Textiles Co*., 244 NLRB 168, 170 (1979) (*overruling* an employer objection wherein a Board Agent required employee observers to remove a pocket saver bearing the name of the employer but another Board Agent allowed Union observers to wear campaign insignia);

was another employee witness who testified to not observing any voter or observers wearing any pins or buttons related to the election. *See*, Tr. 730:8 - 730:10.

Further, to the extent that the Board failed to detect every instance that a voter was wearing Vote Yes or Vote No paraphernalia, there is no evidence that such inaction was in any way disparately applied. That is, just as certain voters were able to wear the yellow lanyards which stated in small letters "Vote Yes", other voters were permitted entry to the tent wearing "Vote NO" shirts. Sophia Campbell was an observer for two (2) voting sessions and she saw a voter enter the tent wearing a "VOTE NO" shirt. See, Tr. 1565:5 - 1565:9. Jasmine Gordon also was permitted to enter the tent wearing a "VOTE NO" shirt, it was only when she reached the very front of the line and attempted to check in that she was asked to cover her shirt. See, Tr. 1632:14 - 1633:16. Cassio Mendoza similarly testified that he observed the NLRB permit at least one (1) voter to vote wearing a "Vote NO" T-shirt. See, Tr. 5021:14 - 5022:7. The fact that there was testimony in the record that some voters were permitted to vote while wearing their yellow ALU lanyards. thus, is of no moment. Although Xiomara Rosado actually recalled seeing that the lanyards stated "Vote Yes," *See*, Tr. 3085:1 - 3085:7; Tr. 3088:4 - 3088:9, it is obviously much smaller and substantially harder to actually read when it is around someone's neck than the large "VOTE NO" printed across the front of a T-Shirt. *See*, Tr. 3599:24 - 3600:8; Emp. Ex. 725.[8] In addition, it is undisputed that it was quite cold for the duration of time that the polls were open and that most voters were wearing jackets, sweatshirts, and other clothing that could act to obscure a lanyard around one's neck. *See, e.g.,* Tr. 801:17 - 801:25; Tr. 836:25 - 837:1; Tr. 838:2 - 838:7; Tr. 2503:18 - 2503:23; Tr. 2690:3 - 2690:7; Tr. 2901:15 - 2902:7; Tr. 3100:24 - 3101:5; In fact, most voters, many of whom had

[8] While Megan Matos testified that she did observe the yellow lanyards to say "Vote Yes," it became obvious on cross examination that she only knew the lanyards said "Vote Yes" because an Amazon attorney had pointed it out to her prior to her testifying in this hearing. *See*, Tr. 3252:6 - 3252:25.

testified to seeing these lanyards around the facility for some time, did not even realize that they said "Vote Yes" on them, most believed they only said "ALU" on them. Jodi Tredici, an employee witness testified that she saw one (1) voter enter the tent wearing a yellow ALU lanyard that she believed had the words "ALU" on it; she did not see whether the ALU lanyard said "Vote Yes" on it. *See*, Tr. 984:9 - 985:7; Tr. 1035:16 - 1035:18. Catherine Litto, another employee witness also testified that when she saw yellow lanyards inside the voting tent they said "ALU" on them and she did not see any paraphernalia that stated "Vote Yes". *See,* Tr. 2775:3 - 2775:19. Charlene Novoa, another employee witness also testified that the yellow ALU lanyard only said ALU in bright white letters. *See* Tr. 2896:2 - 2896:14. Matthew Cordova, was yet another employee witness that did not observe the yellow lanyard to say "Vote Yes." *See*, Tr. 1292:9 - 1295:11. Adekunle Oyalaja, another employee witness that saw the yellow lanyards also believed they only stated "ALU" on them. *See,* Tr. 2505:5-2505:13.

It is quite obvious that the testimony elicited throughout this hearing reveals that certain Board agents did not realize that the yellow lanyards said "Vote Yes" at least in part due to the fact that many of the voters were invariably wearing jackets and other cold weather clothing due to the cold temperatures during the polling sessions which would have obscured anyone's ability to actually see what the lanyards said on them. In addition, Board Agents are not robots and cannot be expected to be perfect. Perfection is not the standard. *See, e.g., Polymers, Inc.*, 174 NLRB 282 (1969), enf'd 414 F.2d. 999 (2d. Cir. 1969)[9]. There was nothing about certain Board agents

[9] "Election procedures prescribed by the General Counsel or a Regional Director are obviously intended to indicate to field personnel those safeguards of accuracy and security thought to be optimal in typical election situations. These desired practices may not always be met to the letter, sometimes through neglect, sometimes because of the exigencies of circumstance. The question which the Board must decide in each case in which there is a challenge to the conduct of the election is whether the manner in which the election is conducted raises a reasonable doubt as to the fairness or validity of the election."

permitting certain voters to wear yellow ALU lanyards that would create a "reasonable doubt as to the fairness or validity of the election."

Further, there was a clear distinction in the paraphernalia the Board was permitting to be worn in the voting area versus that which they were prohibiting. Shirts that say "Vote NO" clearly convey an actual message, a message directing a voter how specifically to vote. Furthermore, it is undisputed that the text on the "Vote NO" shirts that voters wore to the polls was quite large. See, Tr. 985:12 - 985:25; Emp. Ex. 545. On the other hand, ALU buttons were simply a button with an image of three raised fists coming out of a box. See, Tr. 2870:4 - 2870:19; Emp. Ex. 232-A. ALU T-shirts were just that, T-shirts that came in multiple colors that had the letters "ALU" emblazoned across the front along with the same image of raised fists that appeared on ALU pins. The T-shirts and ALU buttons did not contain the words "Vote YES" or any such similar language directing a voter to take any specific action. See, e.g., Emp. Ex. 527; Tr. 3088:25 - 3089:6. Although Gregory Purpura testified that on Tuesday, March 29, he went to vote while wearing three (3) pins, and was asked to cover them before voting, this situation is clearly distinguishable. See, Tr. 704:20 - 705:10; Tr. 707:2 - 707:12. The pins that Mr. Purpura was wearing were ALU pins with the ALU symbol that he had obtained from the ALU table but had been modified such that the pins had writing, in bold black letters that stated "FUCK NO, " "NO," and "VOTE NO." See, Tr. 705:18 - 706:10; Emp. Ex. 524; See also, Tr. 723:2 - 723:24. Again, unlike the unaltered ALU pins, Mr. Purpura's pins clearly contained a message directing others how to vote. Once he closed his shirt, Mr. Purpura was permitted to vote. See, Tr. 707:2 - 707:12.

With respect to the presence of logos, approximately 70% of JFK8 associates use a lanyard to carry their IDs around their neck. Amazon also gives away lanyards to its employees based on years of service and they come in different colors and are visible all over the JFK8 facility. *See*,

Tr. 1434:1 - 1435:15; *See also*, Tr. 1523:10 - 1523:20. Guillermo Rentas, a witness who voted during the morning session on March 25, 2022 testified that he was permitted to wear his "Amazon" lanyard while voting. *See*, Tr. 1524:12 - 1524:14; Tr. 1525:16 - 1525:18.

In any event, the actual voters in this election were completely unphased by the fact that certain voters wore their yellow lanyards while other voters were told to cover up "Vote NO" T-shirts. Ms. Rosado put it best when she testified "[s]o why would I sit there and try to lie to you today and say, I can identify who was wearing what? I didn't know that you're not supposed to do that. So why would I pay any more detail to it? I just realized, oh, wow, they got a T-shirt on. Oh, wow, they have a lanyard on. I can't say anything else." *See* Tr. 3102:13 - 3102:19. Ms. Tredici, similarly, did not see any voters enter the tent and then turn around without voting because the voter saw an ALU lanyard or as a result of a voter being told to cover up their "VOTE NO" t-shirt. *See*, Tr. 1035:19 - 1036:6. Robert Castellano testified very similarly. *See*, Tr. 1140:5 - 1140:11. As did Sophia Campbell. *See*, Tr. 1646:9 - 1646:17. Megan Matos, who testified to seeing many lanyards in addition to the yellow ALU lanyards believed that the other lanyards stated "Vote NO" but it did not concern her enough to report that to anyone. *See,* Tr. 3245:10 - 3246:5; Tr. 3257:9 - 3257:12. Ms. Matos similarly did not see anyone enter the tent and turn around to leave without voting. *See*, Tr. 3257:17 - 3257:24.

For all of the above reasons, Objection 10 should be overruled.

G. No Evidence was Presented of Video or Audio Recording of the Voting Area

Objection 11 states as follows:

> **OBJECTION 11**: The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it repeatedly allowed

> Petitioner's observer to audio/video record the check-in tables and voting area on his mobile phone while serving as an observer during multiple voting sessions.

The Employer utterly failed in presenting any evidence in support of this objection. Emmanuel DeLeon, an observer during the first voting session, testified that he observed one of the Petitioner's observers (later identified as Jason Anthony) to have his cellular phone clipped to his waist belt and that he observed the phone flashing. *See,* Tr. 666:8 - 668:7. On cross examination however, Mr. DeLeon indicated that he observed Mr. Anthony with his phone flashing ***before*** the voting actually started, and that once he pointed this out to the Board Agent, she asked the observer to put the phone away, and he complied. *See*, Tr. 672:12 - 673:4; Tr. 678:23 - 679:2; Tr. 3466:17 - 3467:1. Never mind that a light flashing on a phone does not necessarily signify that it is recording, Mr. DeLeon was quite clear that the phone was put away ***before*** voting even started.

Anthony Momodu, an observer at the same table as Jason Anthony during the evening voting session on March 25, 2022 testified that he witnessed an NLRB Agent ask Jason Anthony to put his phone away three times in twenty minutes because Mr. Anthony had his cellular phone on the table or in his hand. Tr. 3354:5 - 3357:7; Tr. 3358:20 - 3359:12. Although he did not put his phone away immediately, Mr. Anthony did eventually comply and the phone was returned to his pocket within twenty (20) minutes. *See*, Tr. 3359:13 - 3359:17. More importantly, on cross examination, Mr. Momodu specifically testified that Jason Anthony was not recording, nor did he witness Mr. Anthony ever point the phone at other voters. *See*, Tr. 3374:19 -3374:23; Tr. 3376:14 - 3376:17.

Charlene Novoa provided even less probative evidence. Ms. Novoa testified that while she was serving as an observer during the evening session of March 29, 2022, she observed Union

observer Cassio Mendoza "glance" at his cell phone and then put it away. *See* Tr. 2873:7 - 2873:18. On cross examination Ms. Novoa expounded on what she meant by observing Mr. Mendoza "glance" at his phone. Ms. Novoa testified that she observed Mr. Mendoza "pull out his phone" followed by him "click[ing] on his screen and put[ting] it back in his pocket." *See*, Tr. 2927:4 - 2927:16. It is quite obvious that the conduct described by Ms. Novoa consisted of Mr. Mendoza checking the time on his phone. At the time this occurred, Ms. Novoa could not even recall if there were any voters in the tent. *See*, Tr. 2927:21 - 2927:23.

Even if this objection was aimed at the conduct of Union observers, there is a complete lack of any evidence to establish that Jason Anthony or Cassio Mendoza were ever audio and/or video recording check-in tables or the voting area. However, this objection is not even directed at the conduct of a Union Observer, rather, it is aimed at Region 29 for allegedly "fail[ing] to protect the integrity and neutrality of its procedures and creat[ing] the impression of Board assistance or support for the Petitioner when it repeatedly allowed a Petitioner's observer to audio/video record the check-in table and voting area on his mobile phone while serving as an observer during multiple voting sessions." Even if the evidence established that Mr. Anthony was recording[10] (which it most certainly does not), the evidence clearly demonstrates that on each occasion a Board Agent became aware of an observer's phone being out of his pocket for any reason, they were immediately instructed to put the phone away. With respect to Mr. Mendoza, inasmuch as the testimony established he only "glanced" at his phone, presumably to check the time, and then immediately returned the phone to his pocket, there would have been no reason for a Board agent to intervene even if they had noticed the conduct that lasted only a brief instant.

[10] Which is ***not*** an objection made by the Employer.

For the above reasons Objection 11 should be overruled.

H. Not a Single Board Agent Solicited a Single Unfair Labor Practice Charge or Other Complaint During the Administration of this Election

Objection 12 states as follows:

> **Objection 12:** The Region failed to protect the integrity and neutrality of its procedures and created the impression of Board assistance or support for the Petitioner when it solicited unfair labor practice charges against the Employer in the presence of voters in the polling area while the polls were open.

The evidence presented by the Employer in support of Objection 12 was somewhere between laughably flimsy and non-existent. The sole testimony concerning this objection came from Employer observer Robert Nicoletti. Mr. Nicoletti essentially testified that a voter came into the voting area and was making statements that "it wasn't right" that Amazon was holding captive audience meetings and telling employees they should "vote no." *See*, Tr. 2203:17 - 2204:6. Mr. Nicoletti further testified that when the voter first came in they were speaking loudly and were quite "animated." *See*, Tr. 2208:22 - 2209:14. In direct response to this voters' actions, a Board agent stood up and directly engaged with this voter and gave him ***content neutral*** information that ***supported*** the employer's right to hold captive audience meetings and instruct their employees to "Vote no." *See*, Tr. 2209:15 - 2209:22. The Board Agent provided additional ***content neutral*** information that despite Amazon's actions being legal, if he wanted to file a complaint, he could do so; but the Agent never offered to assist the voter with filing the complaint nor did the Board Agent give advice or offer opinion as to whether or not the complaint should actually be filed. *See*, Tr. 2210:2 - 2210:12. The end result of this conversation between the Board agent and the voter was that the voter calmed down, received a ballot and voted without further incident. *See*, Tr.

2209:23 - 2210:1. Mr. Nicoletti in fact confirmed that it appeared to him that the Board Agent's actions were taken in an attempt to control the situation. *See*, Tr. 2212:21 - 2212:25.

While "[c]onfidence in the Board election process and standards can be undermined when Board agents fail to maintain strict neutrality in what they say while conducting Board Elections," there is absolutely nothing in the testimony elicited that could possibly indicate a statement of opinion by the Board Agent in this case. *See*, *Ensign Sonoma*, 342 NLRB 933 (2004). Clearly, the Board Agent ably dealt with an "animated" individual by providing him ***content neutral*** advice. There is simply no need to even evaluate the Board's standard for judging an agent's statement under *Athbro*[11] in this matter as the statements made by the Board agent are objectively neutral. In any event, the statements made by the Board Agent in *Ensign Sonoma Health Care Center*[12], in which the election was upheld, were clearly not neutral, especially as compared to the completely neutral and innocuous statements made in this matter.

Clearly, Objection 12 should be overruled.

II. THE OBJECTIONS DIRECTED AT THE ACTIONS OF THE PETITIONER MUST BE REJECTED

Amazon's objections directed to the conduct of the Petitioner are equally unsupported as those directed against the Board.

A. The Employer Failed to Prove Petitioner Engaged in Threats That Affected Voter Free Choice

Objection 13 states as follows:

[11] Which remains the controlling standard for evaluating Board Agent conduct. *See Ensign Sonoma*, at 933.

[12] "Companies don't like Unions because they cannot fire or hire anyone and they cannot take benefits from the staff."

Objection 13: During the critical period and while the polls were open, the Petitioner's members and agents harassed and threatened physical violence and other reprisals against employees who were not supportive of the Petitioner's cause.

In order to evaluate the conduct alleged by the Employer in support of Objection 13, one must start from the premise that "[a] certain measure of bad feeling and even hostile behavior is probably inevitable in any hotly contested election," and the Act does not impose a general civility code on employees with passionate beliefs about unionization. *See*, *Nabisco Inc. v. NLRB*, 738 F.2d. 955, 957 (8th Cir. 1984). The test for whether a certain statement or action should actually be considered a threat is an objective one, to wit, whether a remark can reasonably be interpreted by an employee as a threat. The test is not the intent of the speaker or the effect on the listener. *See, Smithers Tire and Automotive Testing of Texas, Inc.*, 308 NLRB 72 (1992).

Before evaluating the Employer's *de minimis* evidence in support of this objection, it is necessary to dispense with certain conduct alleged or implied by the Employer to be objectionable.

Videotaping and Home Visits Are Not Threats

The record is replete with various references by employees to a Union supporter or agent video recording various activities.[13] Such references should essentially be disregarded as they are dispositive of nothing. The law is clear: videotaping by the Union of employees, even if engaged in protected activity, unaccompanied by threats or other coercive conduct, is ***not*** objectionable conduct. *See, Randell Warehouse of Arizona*, 328 NLRB 1034 (1999); *Cf., Mike Yurosek & Son, Inc.*, 292 NLRB 1074 (1989) (Election overturned where Union representative that was filming

[13] By no means is this argument addressed towards any allegation that there was videotaping by Union agents of the Voting Line nor any allegations that there was video or audio recording inside of the voting tent. Those allegations are addressed separately in this Brief.

told anti-union activist that "we've got it on film… we know who you guys are… after the Union wins the election some of you may not be here…"). There is not a single instance in this record of a witness testifying that any perceived videotaping was connected with any perceived threat by a Union agent or supporter, thus any references to videotaping by the Union should be disregarded in evaluating Objection 13.

The Employer produced Gopi Vaidya who testified that four (4) Union supporters came to her door approximately one (1) week before the election to remind her about the upcoming election, to ask her how she would vote, and to ask her if she had any questions. *See*, Tr. 2085:5 - 2086:14. Ms. Vaidya did in fact have a couple of questions for the Union supporters which they attempted to answer for her. *See*, Tr. 2103:25 - 2105:14; 2113:21 - 2113:24. Ms. Vaidya also reported that one of the (4) supporters appeared to be videotaping the interaction. *See, Id*, at 2105. On cross examination Ms. Vaidya confirmed that when she told Petitioner supporter, Ms. Medina, that she did not want to reveal how she intended to vote, Ms. Medina respected that decision and did not press the issue. *See*, Tr. 2113:12 - 2113:15. There is simply no construction of the facts under which these allegations could be considered a "threat" or otherwise constitute objectionable conduct by the Union. A home visit by Union agents,[14] unaccompanied by threats, is not in and of itself coercive or objectionable. As the only activity that occurred in conjunction with the home visit was alleged videotaping, and such conduct is also in and of itself not coercive or threatening, no objectionable activity occurred. *See, Randell Warehouse of Arizona*. In fact, photographing employees so that the Union can learn the identity and leanings of various employees was an express reason cited in *Randell Warehouse of Arizona* to support the proposition that Union videotaping and photographing was not coercive nor objectionable. *Id*., at 1036.

[14] To be clear, none of the four (4) individuals at Ms. Vaidya's door were ever demonstrated to be Union agents

Robert Castellano was not Threatened

Robert Castellano testified that Derrick Palmer approached him during the small group meeting on February 7, 2022 and said "I know who you are. I trained you. You are only a PA. You don't know anything." *See*, Tr. 1111:12 - 1112:18. On its face, this statement is clearly not a threat; at worst it is an insult. Even out of context, no reasonable person should feel threatened by those statements. More importantly, once this interaction is actually put into context, it is crystal clear that no reasonable person could ever perceive Mr. Palmer's statement as a threat. Mr. Castellano admitted that he initiated this interaction by screaming at Mr. Palmer that "the ALU is just a bunch of thugs." Mr. Castellano further testified that he did not actually fear for his physical safety as a result of this interaction with Mr. Palmer. *See*, Tr. 1120:18 - 1121:16; Tr. 1122:8 - 1124:21; Tr. 1130:11 - 1130:21; *See also*, Tr. 1175:15 - 1175:22. Mr. Castellano claimed that this reaction made him feel harassed and intimidated. *See*, Tr. 1114:11 - 1114:13. This testimony is belied by Mr. Castellano's subsequent statement to Mr. Palmer that "I'm not hiding from you" and proceeded to show him his Amazon identification. *See*, Tr. 1118:20 - 1119:4. Furthermore, Mr. Castellano then waited a week to make a report concerning this incident, and even after making the report, Amazon never followed up and Mr. Castellano failed to follow up again as well. *See*, Tr. 1125:12 - 1126:18. Clearly, neither Mr. Castellano, nor the Employer or any other reasonable person could find this conduct to be threatening.

Adina Goriva Was not Threatened

Adina Goriva testified that Jason Anthony called her a "bitch" under his breath when she refused to take a flyer from him at the ALU table located in the break room. *See*, Tr. 917:1 - 917:12. Clearly, referring to someone as a "bitch" under your breath is ***not*** harassment and it is

certainly not "threats of physical violence or other reprisals." Again, no reasonable person could feel threatened by such conduct.

Andrea Baltazer was Not Threatened

Andrea Baltazer testified to two (2) alleged incidents of "harassment." However, upon review of the actual facts, absolutely nothing that Ms. Baltazer testified to could constitute harassment under any objective standard; certainly the alleged conduct should not cause a reasonable person to feel threatened. Ms. Baltazer first testified that on March 23, 2022, Derrick Palmer laughed at her "for a couple of seconds" as she walked past him. *See*, Tr. 1447:16 - 1448:11. Never mind that laughing at someone is not "harassment," the witness cannot actually testify with any certainty as to why Derrick Palmer was actually laughing. Ms. Baltazer did not take the time to report this conduct, even though she was well aware that Amazon has a policy where if you are being harassed there is a specific way to report it. *See*, Tr. 1477:10 - 1477:20.

Ms. Baltazer then testified to an alleged second incident wherein someone named Sam Bowman tried to give her an ALU lanyard and when Ms. Baltazer refused, Mr. Bowman replied "who will protect you?" *See*, Tr. 1455:15 - 1456:8; Tr. 1458:3 - 1458:12; *see also* Emp. Ex. 494.6. This testimony was worthless for two (2) reasons. First of all, there was absolutely zero evidence offered by Amazon that Sam Bowman is an agent of the ALU. More importantly, Ms. Baltazer admitted on cross-examination that when Mr. Bowman asked her "who will protect you?" she knew that he meant "who will protect you" from Amazon.[15] *See*, Tr. 1476:11 - 1476:15. Additionally, Human Resources representative Anna Leonarti closed Baltazer's public complaint

[15] As this is an objective standard, it is also clear from the context of the conversation that ***any*** reasonable person would have come to the same conclusion as Ms. Baltazer; the statement "[w]ho will protect you?" was clearly not a threat, especially in the specific context of responding to someone who is hesitant to support a Union.

five (5) hours later without any investigation or comment other than that "Amazon respects every employee's right to participate in voting." *See,* Emp. Ex. 494.6. Tyler Grabowski, Human Resources manager, admitted that Ms. Baltazar's complaint was not about a threat of physical violence, nor harassment, nor a threat of other reprisal by the Petitioner. *See* Tr. 2633:13 - 2633:24. Clearly, neither Ms. Baltazer, the Employer or any other reasonable person could have found this conduct to constitute a "threat."

Lori Adenji was Not Threatened

Although Lori Adenji testified that she heard ALU members talking amongst themselves that they had to "get Felipe," on cross examination Ms. Adenji admitted that she also could have heard them say they have to "do something about Felipe." *See*, Tr. 1506:1 - 1506:10. It is clear from context that Jason Anthony and Brett Daniels were discussing Felipe's action that took place during the February 7, 2022 small group meeting wherein Felipe Santos told ALU supporters that they needed to leave the meeting or they would be considered insubordinate, and whether or how the ALU should respond. *See*, Tr. 1499:10 - 1499:17; Emp. Exs. 304, 662. There simply was no threat made.

Nakeisha Fray was Not Threatened

Jodi Tredici testified that a few weeks before the election she observed her co-worker Nakeisha ("Keisha") be approached by two (2) ALU supporters and that they spoke to her in an angry tone. *See*, Tr. 993:6 - 996:1. This was allegedly because Ms. Fray had covered up the "ALU" on her ALU tee shirt with red tape. *See*, Tr. 1582:25 - 1583:8. They asked Ms. Fray if "Amazon made [her] cover that up." *See*, Tr. 991:8 - 991:9. Ms. Fray had been a supporter of the Petitioner and was in fact in possession of several ALU t-shirts. *See*, Tr. 1591:2 - 1591:10; Tr.

1624:3 - 1624:5; *See also*, Tr. 4446:11 - 4446:20. Ms. Fray testified that Connor Spence kept saying words to the effect of "if a manager told you to cover your shirt… that's a lawsuit " See, Tr. 1602:3 - 1603:6. In this same conversation, Mr. Spence also reiterated to Ms. Fray that Amazon wanted employees to be against the ALU and that she should support the ALU. However, Mr. Spence credibly explained that he approached Ms. Fray because he was concerned, based upon a conversation with another co-worker, that Ms. Fray had been pressured by management to cover up the shirt and to no longer support the ALU, which would have been a violation of her rights. It was only after speaking with Ms. Fray that Mr. Spence realized this was a decision that she made on her own. At that point, Mr. Spence told her that if she has any further questions about the ALU she should speak to him and that she shouldn't necessarily believe everything that management tells her. *See*, Tr. 4443:4 - 4447:23 After the conversation about the shirt Mr. Spence and Ms. Fray continued to remain on friendly terms. They would say hello and goodbye to one another, she continued to ask questions at the ALU table and Mr. Spence offered Ms. Fray his phone number if she had any additional questions about the ALU and she accepted it[16]. *See*, Tr. 1626:7 - 1626:23; Tr. 4448:1 - 4448:13.

Most importantly, asking someone, no matter the context, if they were forced to cover up their shirt by management cannot be reasonably interpreted to be a threat by anyone. Nor can giving them legal advice[17] whether it was solicited or not, be interpreted to be a threat by someone. Secondly, any employee that heard the entire conversation would have understood the context and

[16] Although subjective beliefs are not relevant, employees that witnessed the first interaction between Connor and Keisha could have certainly witnessed Keisha continuing to approach the ALU table and continuing to ask questions. Witnessing such activity should provide additional objective reasons for those employees to not have considered the conversation between Connor and Keisha to be threatening in any respect.

[17] Particularly when that advice is to advise someone that they may have a lawsuit for which they would have the right to sue another party.

clearly understood that Mr. Spence was legitimately concerned that Ms. Fray was the victim of unlawful behavior by the employer, and Mr. Spence was trying to assist her in that respect, not threaten her. Again, under no construction of these facts could any reasonable person perceive these statements or actions as a threat.

The Written Complaints Produced by Amazon do not Constitute Threats

The Employer went on to produce a number of written "complaints" that they alleged are kept in the ordinary course of business and should be treated as business records.[18] Although these are not business records, and should not be admitted for the truth, none of the allegations in the "complaints" would even constitute threats.

The employer first produced a complaint filed by Dana Miller, against Natalie Monarrez for conduct that on its face was a personal issue between two (2) individual employees that occurred more than one (1) month after Ms. Monarrez left the ALU. *See*, Emp. Exs. 237, 242; Tr. 3956:9 - 3956:19. The Petitioner was not even named in this Complaint, and nothing in this Complaint in any way implicated the ALU.

The employer also produced a Voice of Amazon ("VOA") post by Dana Miller which complained of "bullying and harassment" but did not provide any other specifics such that any reasonable person could find the "bullying and harassment" to actually be "threatening" or "coercive." *See*, Emp. Ex. 238. Two days after Ms. Miller[19] posted this "complaint" on the VOA

[18] Petitioner argued unsuccessfully that these records should not be admitted under the business record exception to the hearsay rule. Petitioner continues to believe these documents should not be considered. Employee complaints are not records kept in the ordinary course of business by the employer. An employee complaint is generated by an employee making a specific allegation to which the truth of the allegation is highly relevant; yet by admitting these employee complaint forms without testimony from the employees for the truth of what was contained therein, Petitioner was denied the opportunity to cross-examine these employees with respect to their alleged complaints

[19] Whom the Employer failed to call as a witness in this proceeding

Board, Senior Human Resources Manager, Tyler Grabowski responded by closing her complaint and commenting that "Amazon.com was asking her to vote NO to ALU representation." On cross examination, Grabowski admitted that he did not believe the complaint was "an immediate threat," did not remember if he had investigated this complaint, and was forced to concede that he decided that "no action was required". *See* Tr. 2596:23 - 2596:24; Tr 2597:3 - 2600:8. He was also forced to admit to not having spoken to any member of the Petitioner regarding alleged harassment or bullying of Dana Miller. *See* Tr. 2601:21 - 2602:4.

The employer also produced an additional VOA post by Dana Miller wherein she simply gives her reasons for voting against the ALU; certainly there is no evidence of a "threat" being made to anyone contained therein. *See*, Emp. Ex. 494.2. Furthermore, within 2 hours of making that "complaint," Dana Miller's public complaint was closed by Anna Leonarti, a member of JFK8 Human Resources management. Despite the fact that her complaint was closed so quickly, Mr. Grabowski, lateral to Ms. Leonarti, testified incredibly that "it varies" in regards to whether investigations into threats and/or harassing behavior can be completed in 2 hours. *See* Tr. 2628:2 - 2628:11. Mr. Grabowski did concede on cross examination that there are no allegations by Ms. Miller against Petitioner for harassment, for any physical violence or for any other reprisals. *See* Tr. 2628:15 - - 2629:5. He also could not testify with any certainty if this complaint was ever investigated at any time. *See*, Tr. 2628:12 - 2628:14. None of Dana Miller's "complaints" possibly constitute harassment or a threat under any reasonable objective standard.

The employer then offered a complaint filed by Jodi Tredici[20]. In addition to her obvious bias against the ALU, Ms. Tredici's complaint should be disregarded for an additional reason. Her

[20] The self-professed individual who "started the Vote No" campaign and distributed 1000 "Vote NO" t-shirts in the week before the election. *See*, Tr. 1031:4 - 1032:3.

"complaint" is not a "complaint" of any type of threat of any kind. It is merely a baseless and unsupported statement grounded in obvious racism that Amazon should have been embarrassed to even proffer but have shamelessly entered into this record. *See,* Emp. Ex. 239 (wherein Ms. Tredici baselessly alleges that President Smalls is a gang member and she does not understand how "people like him" can run a Union).

The employer also offered a VOA post by Stephanie Lopez wherein she asks "[w]hat's up with these ALU members bullying…" without offering any explanation of what she means by bullying. *See*, Emp. Ex. 497. Ms. Lopez testified that she wrote this comment because she felt that "certain people" "were bullying, and that's about it." *See* Tr. 2722:12 - 2722:14. However she was forced to admit that "the ALU was never bullying" her. *See* Tr. 2725:9 - 2725:11. Later she changed her testimony to say that when Jason Anthony replied to her online comments, the ALU was bullying her, but she never printed out those online "bullying" comments and never gave them to the Employer to make a complaint. *See* Tr. 2725:13 - 2726:8. On redirect, Ms. Lopez further clarified that what she found bullying about Mr. Anthony was that he would use the words "crap" or "shit". *See* Tr. 2739:19 - 2740:24. Ms. Lopez also testified that what she considered to be bullying from Jason Anthony was: "[h]e would come against my post, talking negatively, saying how it's basically -- whatever I shared or posted -- was ridiculous." *See* Tr. 2749:6 - 2749:24.

Ms. Lopez also testified that she has no recollection of anyone from Amazon ever investigating her complaint. *See* Tr. 2723:2 - 2723:6. Ms. Lopez also admitted that she made this complaint four (4) days before she voted and that "of course" her complaint did not stop her from voting. *See,* Tr. 2724:17 - 2724:22. Certainly, based upon all of the above, neither Ms. Lopez, Amazon nor any other reasonable person would find the conduct (which essentially consists of coarse language and differences in opinion) alleged by Ms. Lopez to be a "threat."

The employer then offered two (2) VOA posts by Jason Anthony wherein he accused Natalie Monarrez of "turning women against the ALU," "being the most racist person [he] has ever met," and being "ungrateful." *See*, Emp. Exs. 240, 241. Again, under no construction of the facts could any employee perceive these comments as a threat.

Finally, the employer offered multiple VOA posts and an employee complaint form filed by Natalie Monarrez. *See*, Emp. Exs. 242, 243, 244, 494.5 Although these exhibits are certainly not evidence of a threat owing to their hearsay nature, inasmuch as there was significant testimony regarding the allegations made in these complaints, that testimony shall be addressed, *infra.*

Natalie Monarrez Provoked Multiple Confrontations but was Never Threatened

Amazon points to isolated verbal altercations between ALU supporters and *one* anti-union employee, Natalie Monarrez, on March 25, which occurred *after* she had already voted. *See*, Tr. 4112:22 - 4113:22. In Ms. Monarrez's telling, apparently after she made provocative remarks to him concerning his mental disability, Ms. Monarrez states that ALU supporter Jason Anthony began "screaming and cursing," "took a step forward towards [her] and started putting his fingers in [her] face," and accused her of being a "traitor" who had "turned [her] back on the ALU." *See,* Tr. 4011:13 - 4012:14. Ms. Monarrez never testified that Mr. Anthony made any physical contact[21] with her or made an actual threat against her, and she testified that she "got tired of it, and turned around and walked away." *See*, Tr. 4012:20 - 4013:2. In contrast, while agreeing that their interaction on March 25, 2022 was about her "banner" (sign) which was hostile to the ALU, Mr. Anthony still wanted to approach her with kindness "...since she was a former member of the ALU and we helped her in the Union and me, personally, knew her situation, I expressed my

[21] This fact was confirmed by Employer witness Andrea Baltazer. *See*, Tr. 1470:18 - 1470:19.

disappointment in a very, very polite way." Tr. 3679:5 - 3679:17. But, when Mr. Anthony told her she had betrayed the union, Ms. Monarrez responded in a "very, very demeaning way, telling me, like, I wasn't worth nothing. Saying words that I'm not going to say it here in this forum. And even saying things towards my sexual orientation, towards my mental illness, that even I don't even say towards a woman." *See*, Tr. 3679:21 - 3680:3.

Petitioner witness Cassio Mendoza also credibly rebutted Ms. Monarrez's testimony and corroborated Mr. Anthony's version of the events. Specifically, Mr. Mendoza testified that after Mr. Anthony told her she was a traitor to the Union that "[Natalie] really exploded and started screaming '[s]crew you Jason, screw you. You're a child, screw you' and stormed out of the break room." *See*, Tr. 5039:19 - 5039:24. Ms. Monarrez in fact corroborated this testimony by Mr. Mendoza when she again, in reference to Mr. Anthony, testified that "he has the mind of a child." *See*, Tr. 4013:21 - 4013:25.

Ms. Monarrez went on to testify that, later that afternoon, ALU officers Derrick Palmer, Angelika Maldonado, and Brett Daniels yelled at her in the break room when she displayed an anti-union banner, calling her various names and cursing at her. *See*, Tr. 4044:23 - 4045:15. Ms. Monarrez alleged that, after the other two ALU officers left, Ms. Maldonado returned and threatened to "kick [her] ass in the parking lot."[22] *See*, Tr. 4046:25 - 4047:5. Ms. Maldonado credibly denied this testimony. When specifically asked if she had made any threatening statements to Ms. Monarrez, Ms. Maldonado replied "[s]o I would never take that risk. And risk

[22] The Board has repeatedly embraced the commonsense notion that such statements are not, in fact, bona fide threats of physical violence. *See Lamar Co*., 340 NLRB 979, 981 (2003) ("Viewed objectively, a threat by one employee to another to "kick ass," *without more*, is mere bravado that is unlikely to intimidate the listener."); *Leasco, Inc*., 289 NLRB 549, 549 n.1 (1988) (phrase "constitutes a colloquialism that standing alone does not convey a threat of actual physical harm").

our whole election and threaten a coworker and even my job for - you know, to sacrifice the time I took away from my child and all the effort that I put hours into the building connecting with our coworkers, to make a threat against another coworker. And even so, that's just not my nature. I don't go around threatening people." *See*, Tr. 4251:2 - 4252:6. It is uncontested that no ALU supporter, in fact, harmed Ms. Monarrez at any time and that she was not, in fact, dissuaded from voting against the ALU or from expressing her views to other Amazon employees.

Ms. Monarrez also testified that ALU supporters sent her text messages expressing disappointment in her actions and threatening to tell a candidate for elected office that she no longer supported the ALU. There is no indication that this "threat" to convey accurate information—that Ms. Monarrez was, in fact, opposing the ALU's union drive—was ever acted upon or disseminated to anyone else in the bargaining unit. Amazon fails to articulate a theory as to how this could have possibly coerced the free choice of other bargaining unit members. Perhaps even more importantly, as explained by Cassio Mendoza, who is not an agent of the ALU, his texts to Ms. Monarrez were made on a personal level and had not been directed by the Petitioner. The fact that officers of the ALU may have ***considered*** informing a candidate for elected office of truthful information, is certainly not probative of this objection. *See*, Tr. 5043:8 - 5043:25; Tr. 5073:9 - 5073:21; Tr. 5082:21 - 5083:8.

Ms. Monarrez's credibility is further undermined by her own statements that the incidents she complained of occurred in view of Amazon's security cameras and security personnel, which the employer failed to produce. *See*, Tr. 4013:10 - 4013:14; Tr. 4045:9 - 4045:15; Tr. 4060:13 - 4060:19. On that basis, a negative inference must be drawn against the Employer with respect to Ms. Monarrez's claims.

Standard for Evaluating the Conduct

Amazon's objection that ALU members "harassed and threatened physical violence and other reprisals" against employees unsupportive of the union is frivolous. In an election where over 4,800 ballots were counted and the margin of victory exceeds 500 votes, even assuming the veracity of the testimony, Amazon points to only isolated verbal altercations.

When the conduct of union agents is at issue, the Board considers whether it "reasonably tends to interfere with the employees' free and uncoerced choice in the election." *Baja's Place*, 268 NLRB 868 (1984). The term "employees," of course, is stated in the plural, referring to the total group of employees voting to select their representative and the context of the election as a whole. The question then, is whether two verbal altercations involving one employee[23]—who, having already voted, thereafter continued her anti-union agitation undeterred—tended to interfere with the free choice of *thousands* of bargaining unit members.[24] Though even posing this question is absurd, the answer is evident—no.

The Board has declined to set aside elections involving conduct far more extreme than that alleged here. *See, e.g., Cornell Forge Co.*, 339 NLRB 733 (2003) (election won by 16 votes where member of in-plant union organizing committee allegedly made threats to have "gang friends" harm anti-union employee); *Mastec N. Am., Inc.*, 356 NLRB 809, 810 (2011) (union supporters threatened to "whip [antiunion employee's] ass," and "bitch slap" two other employees, in election

[23] As explained, supra, with the exception of Ms. Monarrez's testimony, none of the other allegations related to Objection 13 come anywhere near meeting the standard for a person to objectively find them "threatening." Similarly, Ms. Monarrez's allegations, even if true, would also not rise to the level of a "threat" but in any event, the extensive testimony at least warrants comment.

[24] Where a threat originates from employees who are not union agents or from other third parties, the Board is even more reticent to set aside elections, doing so only when "the misconduct was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803 (1984). ALU does not concede that Jason Anthony or Cassio Mendoza were union agents, but it is clear that their alleged conduct, even if true, does not warrant the setting aside of the election under any standard.

with 2-vote margin); *Bell Trans*., 297 NLRB 280, 281 (1989) (union supporter slapped and threatened to kill union opponent in presence of 13 of 292 bargaining unit members, in election with 14-vote margin). Moreover, where the Board *has* set aside elections on account of alleged threats made by union agents, it has invariably been in exceedingly close elections decided by a handful of votes. *See, e.g., Bellagio, LLC*, 359 NLRB 1116 (2013) (union agent threat to an employee that "if this vote goes through, you're toast" in an election where union prevailed by a single vote)*; Home & Indus. Disposal Service*, 266 NLRB 100 (1983) (threat of violent reprisal made 1 hour before an election where the union prevailed by a single vote).

The employer has utterly failed to meet their burden to prove such threats or reprisals. The employer put into evidence a series of "incidents" that they purport should be considered either "harassment" or "threats of physical violence and other reprisals." Inasmuch as there is no code of civility with respect to representation elections, conduct that might be considered "harassment" (which the Petitioner does not concede occurred) would ***not*** be objectionable unless it was accompanied by actual threats or other coercive conduct that an employee could reasonably construe as a threat.

Amazon's Objection 13 is groundless and should be overruled.

B. The Employer Failed to Demonstrate That the Petitioner's Communication That Dues Would Only Be Charged After A Contract Was Not An Impermissible Grant of Benefit or A Misrepresentation

Objection 14 states as follows:

> **Objection 14:** Petitioner improperly promised employees in the final days of the campaign that it would not charge them dues unless and until the Petitioner secured a raise for employees during collective bargaining. Prior to and during the critical period, the Petitioner was clear that it would charge employees dues immediately following a

> successful vote. After employees expressed reluctance to pay dues, the petitioner directly contradicted its earlier statements and asserted for the first time late in the campaign that it would not charge dues unless and until it secured higher wages in contract negotiations with the Employer.

Between the wording of the actual objection and the scattershot method in which the Employer presented evidence allegedly in support of this objection, it is hard to decipher if the basis of Employer's objection 14 is an "improper grant of benefit" or a "misrepresentation." In either case, the objection should be overruled.

At some point in time "in the middle of the campaign[25]" (definitely after January 20, 2022), the ALU website did state that dues would be taken out of paychecks after a successful union vote but that the ultimate level of dues would be democratically decided by the membership. *See*, Emp. Ex. 286, at Pg. 3; *See also,* Tr. 444:10 - 445:1; Tr. 463:8 - 463:13. At some time prior to January 23, 2022, the Employer began using "table-toppers" to communicate a message to employees that "The ALU… will charge all of its members dues 'roughly equal to a few dollars each week' and that it intends to take that from each paycheck after the election." *See*, Emp. Ex. 3206. Mr. Smalls, in a tweet on January 23, 2022 replied to that campaign message from Amazon by stating both that dues would be democratically decided by the workers, and that "we will not collect a single penny until we are paid more" *See*, Tr. 4600:1 - 4600:25; *See also, e.g.,* Tr. 4604:23 - 4605:1. In late January or early February, in response to employee feedback, the ALU distributed a flyer that stated that "proposed dues" would be "$5 per week for Full Time Associates… pending

[25] Ms. Donaldson testified that she reviewed the Petitioner's website many times over a period of several months; thus it is highly unlikely she can remember with any degree of precision what dates she reviewed which versions of the webpage. *See,* Tr. 442:10 - 442:16. In addition, administrative notice should be taken that the version of the webpage offered is from "The Wayback Machine" which is an internet archive of cached web-pages. This means that the versions of the web page offered were not actually the web page that Ms. Donaldson viewed and printed; rather, she accessed a cached older version of the webpage from The Wayback Machine. Ms. Donaldson's failure to testify to the ***specific*** date of the cache that she accessed should create a negative inference against Amazon.

voting, approval and authorization…" *See*, Tr. 4372:22 - 4373:14. At some point in late-February, the ALU posted their Constitution and bylaws to their website; at that time those documents indicated that "Dues amount and payment frequency will be democratically voted on by the membership. In the period preceding the initial election, dues will be in the amount of five dollars every two weeks." *See*, Tr. 461:3 - 461:6; Emp. Ex. 298. In a posting to the ALU website in March, the ALU again stated that dues would be democratically decided by the membership. *See,* Tr. 451:12 - 452:6; Emp. Ex. 287. Approximately ten (10) days before the election, the ALU distributed a flyer that stated, *inter alia*, "No Dues until Contract… We will not start paying dues of $5/week until we have voted to approve our first contract." *See*, Tr. 4374:10 - 4375:4; Emp. Ex. 491. Shortly before the election date the website was modified to reflect that ***proposed*** dues were $2.50 per week for part associates; $5.00 per week for full time associates and $6.50 per week for Tier 3s. The same information was posted in flyers in the breakroom. *See*, Tr. 458:11 - 459:18; Emp. Ex. 294. Tr. 461:11 - 462:6; Emp. Ex. 288. In a letter to JFK8 associates dated March 22, 2022, Mr. Smalls reiterated that promise as he stated, "I promise, not one single payment of dues will be taken until we have a contract with higher wages signed." *See*, Tr. 4603:1 - 4603:12; Emp. Exs. 290, 291, 529, at Pg. 3. The day before the election, Melissa Martinez testified that she asked a question via text message about dues and received a response that "if we can't win an increase in our wages no dues will be taken from us." *See*, Tr. 2038:17 - 2039:23; Tr. 2043:3 - 2043:5; Emp. Ex. 297.4.

Ms. Martinez testified that prior to receiving the text message regarding dues on March 24, 2022 the only other information she had heard about dues came from what she had been told in the employer's captive audience meetings wherein they stated dues would be taken from her paycheck by the ALU but they did not specify a timeframe or amount. *See*, Tr. 2043:11 - 2044:2.

At a later date, Ms. Martinez reviewed the ALU website and learned that dues would be "$5" or "$3" but it "was based on what shift you worked." *See*, Tr. 2043:13 - 2044:5. On March 24, 2022, based upon the text message she received, her understanding of dues changed to that no dues would be taken until a contract was approved. *See*, Emp. Ex. 297.4. Ms. Martinez confirmed that to date, the Amazon Labor Union has not taken any dues from her. *See*, Tr. 2047:10 - 2047:13.

Ms. Litto, an admitted anti-union witness, testified that she also read the letter written by Mr. Smalls (Emp. Ex. 529) and that she discussed it with several co-workers. *See*, Tr. 2772:4 - 2772:7; Tr. 2760:21 - 2763:11. Ms. Litto went on to explain that no one ever explained to her when dues would be taken out of her paycheck[26] and then incredibly claimed she did not even remember if dues were mentioned in Mr. Smalls' letter that she had just testified to reading. *See*, Tr. 2774:10 - 2775:2.

Ms. Rosado testified that she "had a lot of conversations about dues with several different people… The one that really sticks out is with Brett." *See*, Tr. 3064:1 - 3064:6. Ms. Rosado testified that this conversation with Brett occurred "way before [the election], like the month of January." *See*, Tr. 3067:25 - 3068:7. Ms. Rosado testified that "he wasn't giving any specifics… he was just going off 3 percent, 5 percent, 10 percent, but he couldn't narrow it." *See*, Tr. 3065:9 - 3065:14. Ms. Rosado also testified that she attended eight (8) small group meetings held by Amazon wherein they told her that the Amazon Labor Union would take dues from her paycheck but they did not give a specific time frame or amount. *See*, Tr. 3093:4 - 3095:15. Ms. Rosado similarly confirmed that she has not yet paid any dues to the Amazon Labor Union. *See*, Tr. 3096:4 - 3096:8.

[26] Despite the fact that the letter she just testified to reading would have explained exactly that.

Gopi Vaidya testified that one (1) week before the election four (4) union supporters appeared at her door to discuss the ALU[27]. *See*, Tr. 2085:5 - 2085:16. In response to Ms. Vaidya's question about dues, Union supporter Justine Medina "did not have [a] specific answer" but did elaborate that dues would start coming out "after the negotiation and all that stuff is over." *See*, Tr. 2104:25 - 2105:12.

Andy Martinez testified that in the last couple of days before the election and during the election he engaged in text communications with the Union asking if he had any questions about dues. He asked a couple of questions and was told "no dues taken until a contract was in place and there would be no back paying to settle." *See*, Tr. 3269:3 - 3270:5; *See also*, Emp. Ex. 295. Mr. Martinez also received the same email from Christian Smalls. *See*, Tr. 3272:20 - 3273:12; *See also*, Emp. Ex. 290. On cross examination, Mr. Martinez reiterated that all communications he received from the Amazon Labor Union concerning dues were consistent. *See*, Tr. 3275:3 - 3275:8

Eustaquio Viernes testified that he received an email communication from the Union on March 21, 2022. *See*, Tr. 2943:2 - 2944:23. The email was clear that dues would be $5 per week and no one would pay dues until a first contract is approved. *See*, Emp. Ex. 571. Mr. Viernes also received the letter from Christian Smalls on March 22, 2022. *See*, Tr. 2947:24 - 2948:24. Mr. Viernes confirms that to date, he has not paid any dues to the Amazon Labor Union. *See*, Tr. 2949:15 - 2949:17. On cross examination, Mr. Viernes explained his understanding that dues would not be due until a contract was negotiated and that even then, the actual amount of dues would be democratically decided. *See*, Tr. 2950:2 - 2950:12. According to Mr. Viernes, any confusion he may have regarding the amount of dues and when they would be owed is as a result

[27] Inasmuch as these are Union supporters, and not union agents, the Union is not responsible for this conduct.

of the confusing messaging provided to him in Amazon's small group meetings. *See*, Tr. 2950:13 - 2951:19.

All the employees who testified regarding this Objection testified that they had not been required to pay dues yet and they all understood that dues would not be due and owing until a contract was signed. The only confusion to the employees regarding dues seemed to be as a result of Amazon's small group meetings.

Even if, *arguendo,* the Amazon Labor Union was not taking a consistent position with respect to the dues structure, at worst, this would constitute a campaign misrepresentation. For at least forty (40) years, it has been clear that campaign misrepresentations are ***not*** objectionable. *See, Midland National Life Ins. Co.*, 263 NLRB 127 (1982). In any event, the fact that the ALU Constitution may have suggested a current dues structure while the ALU was simultaneously stating there would be no dues to JFK8 Associates until a contract was approved, is not inconsistent or misleading in any way. The ALU can both have a dues structure—in this case, they do not yet have any other shops, but, if they did, that structure would arguably apply—and offer to ***not*** charge dues to JFK8 employees prior to voting to approve a first contract.

Any suggestion that the Union's offer to not charge dues to JFK8 members until a contract was approved is some sort of "improper grant of benefit" is equally laughable. Again, for decades it has been the law that a Union offer to waive dues or initiation fees to an entire bargaining unit until a first contract is approved is absolutely permissible. *See, L.D. McFarland Co.*, 219 NLRB 575 (1975), *aff'd.* 572 F.2d. 256 (9th Cir. 1978) (*approving* a waiver of initiation fees and dues for all employees in the plant); *See also NLRB v. River City Elevator*, 289 F.3d. 1029, 1032 (7th Cir. 2002); *U-Haul of Nev. Inc. v. NLRB*, 490 F.3d 957, 961-62 (D.C. Cir. 2007); *Cf. NLRB v. Savair*

Mfg. Co., 414 U.S. 270 (1973) (*holding* that waiver of initiation fees conditioned upon the signing of union authorization cards prior to a representation election was improper and should result in the setting aside of the election)

For the above stated reasons, Objection 14 should be overruled, as a matter of fact and law.

C. Objection 15 Must Be Overruled As the Employer Failed to Show Any Conduct By Union Agents of Supporters Interfered With Their Ability to Communicate Its Anti-Union Message

Objection 15 states as follows:

> **Objection 15:** The Petitioner engaged in repeated and deliberate attempts to interfere with and "shutdown" the Employer's small group meetings, solicited employees during the Employer's educational meetings in violation of the Employer's policies, and destroyed the Employer's campaign materials.

By this objection, the Employer is alleging that various supporters of the ALU engaged in misconduct in violation of the Employer's policies to solicit voters. They allege by attending one-and-a-half small group meetings to which they were not invited, and in pulling down a few of the Employer campaign materials, Petitioner's supporters and agents impacted the outcome of the election. The Employer's contention has no basis in fact.

Chaka Donaldson, the co-captain of the JFK8 management team, was responsible for Amazon's informational campaign for associates with respect to the Petitioner for election in JFK8. *See,* Tr. 172:2 - 178:13. In performing her duties in that role, Ms. Donaldson was personally present at the JFK8 facility seven days per week for approximately fourteen (14) to fifteen (15) hours per day during the critical period. *See*, Tr. 178:20 - 179:9.

The information campaign led by Ms. Donaldson consisted of holding small group meetings (also known as informational sessions), putting up posters and table toppers, sending "Text-Em-Alls" (texts to all of the associates) , sending "Push Notifications" through the "A to Z App" for associates, placing "Installments" (signs inside of bathroom stalls), participating in one-on-one engagement with associates, and creating a website (unpackjfk8.com). *See*, Tr. 179:10 - 180:6; *See also*, Tr. 1176:17 - 1181:5. Amazon used multiple methods to communicate with its employees because people learn differently and Amazon wanted to reach as many people as possible. *See*, Tr. 180:12 - 180:20. The purpose of Amazon's informational campaign was to "...provide information to associates. It was to make sure that associates understood Amazon's position and Amazon's [Employee Relations] philosophy." *See*, Tr. 476:3 - 476:13. Amazon's Employer Relations philosophy is that "a direct relationship between Amazon and the employee is the best relationship." *See,* Tr. 477:11 - 477:19.

Ms. Donaldson further described the small group meetings as a meeting of a group of 20-30 Tier 1 and Tier 3 associates in the Day 1 and Career Choice Rooms where two employee relation professionals would give a presentation. One would be speaking and answering questions, while the other would be running the slide show. *See*, Tr. 180:21 - 181:24.

Amazon had scheduled its first set of small group meetings to commence at 8:00 a.m. on February 7, 2022. The meetings were supposed to take approximately thirty (30) minutes each. Amazon scheduled approximately twenty-five (25) meetings for the first day to take place approximately forty-five (45) minutes apart. *See,* Tr. 183:20 - 184:10. The accuracy of this statement is consistent with Ally Miller's testimony that there were meetings held every 45 minutes, about 16 to 18 hours a day, every day of the week with each employee potentially invited to 6 different meetings. *See* Tr. 2986: 3- 18. So in total the Employer ran approximately 25

meetings per day from February 7, 2022 until March 23, 2022 **for a total of at least 1100 meetings.**

On February 7, 2022 at approximately 11:15 a.m. Will Thurmand and Ally Miller were giving a small group presentation in the Day 1 room. *See*, Tr. 190:4 - 190:17. Chaka Donaldson testified that she observed the meeting being interrupted due to "cross-talk" by various attendees in the small group meeting. *See*, Tr. 190:18 - 191:15. The cross-talk consisted of various employees (including one identified as Connor Spence, another identified as Derrick Palmer, another identified as pro-union supporter Justine Medina and another identified as pro-union supporter Jason Anthony) asking questions and giving their opinions on the subject matter being presented. *See*, Tr. 198:6 - 198:20; 200:12 - 200:20. In addition, Ms. Donaldson noted that Jason Anthony appeared to be recording the small group meeting with his cell phone. *See*, Tr. 200:21 - 201:3. Brett Daniels, the ALU Director of Organizing, was also present in this meeting and he was noted to have been snapping his figures to signify his agreement with other statements being made during the meeting. *See*, Tr. 206:23 - 207:24. Chevalli Facey testified that the ALU entered the meeting and began chanting "Vote for the ALU " and also explained that Amazon would not permit them time to give them their viewpoint, so they were going to give it during this meeting. *See*, Tr. 1159:15 - 1159:24; Tr. 1175:6 - 1175:14.

Notwithstanding the "cross-talk" during the meeting, the 11:00 a.m. meeting ran to its conclusion and, in fact, Ms. Donaldson had to give a signal to the presenters to wrap it up as it was running overtime and they wanted to ensure the next scheduled presentation could start on time. *See*, Tr. 208:4 - 208:21; *See also*, Tr. 1181:17 - 1185:14.

After the conclusion of the 11:00 a.m. meeting and prior to the 11:45 a.m. meeting beginning, JFK8 General Manager, Felipe Santos entered the room and spoke to the associates present. Mr. Santos asked the associates who were not specifically invited to that meeting to leave the room or they would be subject to discipline. *See*, Tr. 223:25 - 225:24. Derrick Palmer, Jason Anthony, Justine Medina, Brett Daniels and Karen Ponce remained in the Day 1 room. *See*, Tr. 226:6 - 227:16. Amazon also played a video of this interaction for the record. The video clearly shows various Amazon Labor Union supporters calmly and respectfully seated in the meeting asking for the opportunity to participate and ask questions. *See*, Emp. Exs. 304 and 662. After Mr. Santos left the room, Ms. Donaldson testified she made the unilateral decision to end the meeting after approximately five (5) minutes because she was concerned about what she perceived to be disruptions. *See*, Tr. 301:10 - 302:6.

Ms. Donaldson further testified that later on February 7, the ALU's President, Christian Smalls had posted to his Twitter account words to the effect that the ALU had successfully shut down all of Amazon's captive audience meetings for the day. *See*, Tr. 275:4 - 275:18; Emp. Ex. 302. According to Ms. Donaldson's own testimony however, this tweet was wholly inaccurate inasmuch as Ms. Donaldson only canceled the next five (5) meetings, and in fact, the small group meetings started up again on that same day at approximately 4:00 p.m. *See*, Tr. 302:20 - 302:24.

After starting the small group/ captive audience meetings again at 4:00 p.m. on February 7, 2022, those meetings continued uninterrupted—with the sole exception of Derrick Palmer and another associate distributing literature during a meeting on February 8—on a daily basis from 8:00 a.m. until 4:00 p.m. and again from 7:00 p.m. until 4:00 a.m. through March 23, 2022. *See,* Tr. 492:21 - 496:16; Tr. 497:11 - 498:14; *See also*, Tr. 515:22 - 516:3.

Robert Castellano, an associate who had been present during the 11:00 a.m. meeting on February 7 testified that he went to four (4) or five (5) of these mandatory small group meetings. *See*, Tr. 1096:1 - 1096:11; Tr. 1127:14 -1127:24. Chevalli Facey, another associate present during the 11:00 a.m. meeting on February 7 testified that she went to two (2) or three (3) of these meetings. *See*, Tr. 1152:24 - 1153:7. Lori Adenji was also present in the February 7, 2022 meeting but she also attended at least one (1) other meeting in March 2022. *See*, Tr. 1486:17 - 1487:3. Xiomara Rosario testified that she attended eight mandatory small group meetings. *See* Tr. 3093 19-20. Amazon.com Services wanted to have each of its employees who were in attendance at work attend six meetings each from February 7, 2022 to March 23, 2022.

Ms. Donaldson also testified that based upon her review of internal surveillance videos she witnessed Derrick Palmer, Brett Daniels, Justine Medina, and Connor Spence each remove an Amazon poster related to their campaign in the JFK8 election. *See,* Tr. 283:18 - 284:17; Tr. 293:9 - 293:17; Tr. 295:18 - 296:3; Tr. 297:16 - 297:21. Subsequent to the posters being removed, Amazon put up more posters and hung them in frames so they could not be removed as easily. *See*, Tr. 288:18 - 289:4. In addition, Derrick Palmer, Brett Daniels, Justine Medina and Connor Spence were each issued formal disciplinary notices for destruction of company property. The conduct was not repeated. *See,* Tr. 519:8 - 519:24; Tr. 540:8 - 540:13; *See also* Employer's Exhibit 499, 500, 501, 502.

In addition to the small group meetings, between December 22, 2021 and April 1, 2022, Amazon put up between 50 - 100 posters throughout the JFK8 facility to communicate its campaign message. *See*, Tr. 498:15 - 499:7. Amazon also placed approximately 150 signs to communicate its campaign message. *See,* Tr. 499:23 - 502:2. Amazon also used approximately 300 - 400 table toppers to communicate its campaign message. *See*, Tr. 502:4 - 505:9. Amazon

also sent between 5 - 10 text messages to its associates in order to communicate its anti-union message. *See*, Tr. 505:10 - 506:19. Amazon also sent somewhere between 25 - 40 push notifications to somewhere between 6,000 - 7,000 of its JFK8 associates in order to communicate its campaign message. *See*, Tr. 506:20 - 511:20. Amazon also used a website, unpackjfk8.com, to communicate with its associates. *See,* Tr. 511:21 - 512:1. Amazon also communicated with its campaign message to employees by sending direct mailers to all of its associates; the mailers also directed associates to Amazon's campaign website, unpackjfk8.com. *See,* Tr. 537:15 - 538:8; ALU Ex. 14.

Objection 15 alleges that Union agents disrupted Amazon's captive audience meetings, solicited employees during the meetings, and destroyed Amazon's campaign literature. But in *Station Operators, Inc.*, 307 NLRB 263 (1992), the Board dismissed an objection based on similar conduct when "the Petitioner's representatives' confrontations with the Employer's officials during the employee meeting occurred 2 weeks before the election, and the results of the election were not close." *Id.* at 263. In *Station Operators, Inc. supra,* the Board in overruling an objection involving similar conduct, stated: "When considering the actions of union agents in these matters, the test to be applied is whether their conduct "reasonably tend[ed] to interfere with the employees' free and uncoerced choice in the election." *Baja Place,* 268 NLRB 868 (1984). In *Station Operators, Inc,* the incidents in dispute were relatively mild and occurred two weeks prior to the election. There was no evidence that any of the employees who witnessed the incidents were threatened by Petitioner's conduct… Even assuming, arguendo, other unit employees became aware of the incidents, the hearing officer noted that they were not proximate in time to the election and that the election was determined by a wide margin."

Here, not only were the actions by several Petitioner's officers and supporters on February 7 which sought to blunt management's anti-union message unlikely to cause any fear in employees and thus interfere with an employee's free and uncoerced election, these actions occurred at least six weeks before the election. Further, the actions alleged in this objection could hardly have interfered with the Employer's ability to communicate its messages to the JFK8 associates about which Ms. Donaldson testified extensively.

As to the allegation that Union agents destroyed Amazon's campaign literature, Amazon's overwhelming ability to communicate with employees during the work day and in the workplace could not possibly have been impaired by any Union destruction of Amazon's literature.

Most tellingly, the Employer produced no evidence that the actions alleged in this objection put any voter in fear which interfered with employees' free and uncoerced choice in voting in this election.

Based on the above facts and law this Objection must be overruled.

D. <u>The Employer's Claims In This Objection Impermissibly Go Beyond The Scope of the Objections; There Was No Basis to Arrest Mr. Smalls For Trespassing on February 23rd. The Objection Must Be Overruled</u>

Objection 16 states as follows:

> **Objection 16:** Non-Employee Petitioner Organizers Repeatedly Trespassed on the Employer's Property.

Objection 16 alleges that non-employee Petitioner Organizers repeatedly "trespassed" on Amazon property. In Petitioner's motion to dismiss Petitioner argued that dismissal of this Objection was required because it was legally deficient as mere trespass is not coercive and is not

grounds for overturning an election under all but the most extreme circumstances. The Employer had cited *Phillips Chrysler Plymouth*, 304 NLRB 16 (1991), in its objection as one of those extreme circumstances. However, there is no comparison to the allegation of trespass at Amazon and those in *Phillips Chrysler Plymouth*. There, the trespass occurred on the same day as the election, only 75 minutes before voting began, and resulted in a significant stand off between union officials and management. The election was decided by a single vote. None of those facts exist here.

While not stated in the objection, the Employer presented evidence that on February 23, 2022 due to what it alleges were repeated "trespasses" the Staten Island police were called, with the result that two current Amazon associates and former associate and union interim president, Mr. Christian Smalls, were arrested. During the hearing, the Employer sought to expand this objection well beyond the alleged trespasses and arrest to propound a new legal theory, based on the arrests being orchestrated by Petitioner so that supporters could campaign on them. The Hearing Officer admitted evidence of the arrests. The Petitioner maintains that basing this Objection on Mr. Smalls' arrest and actions which followed it expanded the objection beyond what was contemplated by the Regional Director in his statement of this Objection. Petitioner maintains that the Hearing Officer may not consider any arguments based on the expansion of this Objection beyond the alleged trespass and issues that are reasonably encompassed therein. The Case Handling Manual Section 11424.3(b) states, "The Hearing Officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific objections set for hearing by the Regional Director. Thus, any allegations based on any new legal theory or different factual circumstances are insufficiently related to the objections set by the Regional Director for hearing and should not be considered. *See Precision Products Group, Inc.*, 319 NLRB 640 (1995);

Iowa Lamb Corp., 275 NLRB 185 (1985)." Thus, despite the Employer's argument in the record to expand the scope of Objection 16, to include a new legal theory regarding who caused Mr. Smalls' arrest and the sequelae thereto, the appropriate scope for this Hearing on Objections must be only as ordered and listed pursuant to Regional Director Overstreet's April 29, 2022 "Order Directing Hearing and Notice of Hearing on Objections".[28]

Nonetheless, Petitioner contests the allegations of trespass and as well as showing that even the Employer's expanding legal theory is not factually supported. Petitioner addresses the arguments and expounds on the reasons for overruling this objection below.

1. **Chris Smalls Should Not be Considered a Non-Employee but a Discharged Former Employee Within the Meaning of Section 2(3) of the Act and Therefore Was Not a "Trespasser"**

``Employee," as it is defined by Section 2(3) of the Act means "members of the working class generally" including "former employees of a particular employer." *See, Little Rock Crate & Basket Co.*, 227 NLRB 1406 (1977) *quoting Briggs Manufacturing Co.,* 75 NLRB 569, 570 (1947); *See also, e.g., NLRB v. Town & Country Elec. Inc.*, 516 U.S. 85 (1995) (*holding* job applicants would also be considered employees under Section 2(3) of the Act); *Phelps Dodge Corp. v. NLRB*, 313 U.S. 177 (1941).

Certainly, there is no dispute that Christian Smalls is a former employee of Amazon. Under current Board law (endorsed by the U.S. Supreme Court), Mr. Smalls is simply not a "non-employee" under any construction of the facts. He is an employee with section 7 rights whose

[28] *See* Board Exhibit 1a. Despite arguing that the Regional Director's Order was only a summary of the Objections set for hearing, the Employer also conceded in the record that the "Hearing Officer has authority to consider only the issues that are reasonably encompassed within the scope of the specific Objection set for hearing by the Regional Director." *See* Tr. 3178: 9-13.

actions must be considered in the light of section 7. Any references by Amazon to Mr. Smalls being a "non-employee" with respect to this or any Objection should be totally disregarded.

2. The Employer's Reliance on Its Solicitation Policy to Claim that Mr. Smalls Was Trespassing Is Misplaced.

The initial evidence submitted by Amazon to support Objection 16 was Amazon's Solicitation Policy at Exhibit 321, "to establish that Amazon doesn't permit non-employees to solicit" on Amazon's property. *See* Tr.1799: 5-7 However, when Amazon sought to introduce the solicitation policy through Mr. Joe Troy, Amazon's Area Manager for Loss Prevention, the Hearing Officer, correctly asked whether the solicitation policy said anything about trespass. *See,* Tr. 1798:13-15 and 1799:8-11. Counsel for Amazon Larkin stated: The words of the policy? No. But we're in a legal debate, I guess. But if a property owner prohibits solicitation and a person enters onto the property to solicit, that constitutes trespass. *See* Tr. 1799:12-16. On that basis the policy was accepted into evidence.

The actual wording of Amazon's solicitation policy, however, clearly shows in the first sentence that it is limited to "coordinating events for employees and using company resources such as meeting spaces and communication tools (e.g. email, bulletin boards, posters etc.), [and only in such limited instances should employees] follow the solicitation policy below." Amazon identifies prohibited solicitation as "the sale, advertising, or marketing of merchandise, products, or services (except as allowed on for-sale@ alias), soliciting for financial or other contributions, memberships, subscriptions, and signatures on petitions, or distributing advertisements or other commercial materials." *See* Employer's Exhibit 321 This policy by its terms allows for outside organizations and charities to solicit on Amazon property with the permission of Amazon. *See,* last paragraph of Ex. 321. While the policy distinguishes where associates may solicit on

company premises, and that non-employees may not solicit on company property, the definition of solicitation applies throughout.

Petitioner asserts that the solicitation policy which was produced at the hearing, does not apply to the actions of Mr. Smalls on Amazon property. That is, in order to determine if the activities of the ALU alleged non-employees on Amazon property actually constitute "solicitation" the non employees would have to be "coordinating events for employees and using company resources such as meeting spaces and communication tools" and/or engaged in prohibited acts involving "the sale, advertising, or marketing of merchandise, products, or services (except as allowed on for-sale@ alias), soliciting for financial or other contributions, memberships, subscriptions, and signatures on petitions, or distributing advertisements or other commercial materials."

The record does not support a finding that anything done by Chris Smalls falls within prohibited solicitation under Amazon's solicitation policy. Indeed when Mr. Troy claimed that Mr. Smalls entered Amazon property for the purpose of solicitation in January and February 2022, his testimony was objected to based on foundation, as Mr. Troy had not defined the word solicitation. *See*,Tr. 1865:7-15. In response to the objection, Amazon Counsel chose to rephrase and not mention solicitation, and asked Mr. Troy about the times Mr. Smalls entered onto Amazon property. *See,* Tr. 1865:22 to 1866: 4 The next time Mr. Troy mentioned the word "solicitation" was in connection with an allegation that ALU tables were set up on the front sidewalks of LDJ5 and JFK8 where Mr. Smalls was allegedly "soliciting feedback for membership in the Union". *See,* Tr. 1866:20-25 Nothing in the Solicitation policy refers to or prohibits asking associates how they feel about the union. That is, seeking feedback on how an associate feels about a union is not conduct that is "the sale, advertising, or marketing of merchandise, products, or services

(except as allowed on for-sale@ alias), or soliciting for financial or other contributions, memberships, subscriptions, and signatures on petitions, or distributing advertisements or other commercial materials."[29]

Indeed, when on cross examination Mr. Troy was asked for the definition of "solicitation" he was using, he stated: ``So soliciting, in the sense that it's defined in our policy, would be the distribution of materials on Amazon property by non-Amazon associates" *See,* Tr. 1905:21-24. However, nothing in the solicitation policy, cited above, prohibits "distribution of materials" *per se* on Amazon property by non-Amazon Associates. The policy does not refer to Petitioner's volunteers giving out free food, free t-shirts or lanyards, or educational material about the benefits of unionization. Telling Amazon associates about the benefits of unionization does not constitute "distributing advertisements or other commercial materials."

Similarly, when Mr. Zachary Marc, the Assistant General Manager of JFK8 was asked about the solicitation policy, Petitioner's counsel interposed a foundation objection as to the meaning of the term solicitation as stated in the policy. Mr. Marc's response was "My understanding is that solicitation is trying to get a group of people to engage or participate in a certain non-work-related event. And Amazon does not allow solicitation of any kind during work time, in work hours, and as mentioned, by non-Amazon employees. So, for example, something

[29] In fact, Mr. Troy misled the Hearing Officer as to his observation of what occurred at the ALU tables. This is because he was told by the hearing officer that his testimony could only be based on firsthand personal knowledge of events, *See*. Tr. 1815:20-24; 1825:12-18; 1828:19 to 1829:1, and yet on cross examination he admitted that he was not present for any of the events he testified to *See*, Tr. 1905:1-23; 1906:6-12; 1907:7-13. Despite his extensive testimony on direct of President Smalls' solicitation on Amazon's private property, on cross examination, Mr. Troy admitted that he was never actually present at JFK8 to witness any alleged "solicitation" by President Smalls. *See* Tr. 1904-1905:25-7, Tr 1907: 10-13 While he testified that he was inside the facility in the pre-petition period of December 15, 2021, he admitted that he never asked President Smalls to leave the property on that date nor did he ever ask the ALU to remove their table from the JFK8 property. See, Tr 1915:3-5

like, lobbying a group of employees to form a union is something that I would consider solicitation". *See* Tr.2386:15 to 2387:15. This description of Amazon's Solicitation policy appears to be a policy only aimed at preventing union activity, and does not conform to the language of the policy itself which says nothing about union organizing.

Indeed the policy is aimed primarily at commercial enterprises trying to sell or advertise their products to Amazon associates, and the policy provides for Amazon to permit solicitation by others with its permission. Later on cross examination when Mr. Marc was asked whether giving an interview on Amazon property—which was the alleged basis for confronting Mr. Smalls on February 9, 2022—was solicitation, Mr. Marc stated his definition of soliciting was "he [Smalls] was on private property without permission." *See,* Tr. 2442:18-20.

The Employer produced correspondence between counsel dated December 15, 16, 2021 and February 2, 2022. (Exh. 322, 323 and 325) all relating to the Employer protesting alleged violation of its solicitation policy by non associate ALU members. However, a copy of the solicitation policy was not appended to the letters, and was revealed for the first time at the hearing.[30]

[30] The first two letters of December 15, and 16 (Exhibits 322 and 323) were in the pre-petition period and referenced only non-Amazon associates being present, on Amazon property for purposes of "solicitation" In the December 16, 2021 Amazon counsel took issue with Mr. Smalls' stated position that the union was on "public property " occasioned the temporary re-routing of the public bus stop. Although the Employer disagreed with this rationale in the December 16, 2021 letter, the violation alleged was only of the solicitation policy. In neither of these letters did Amazon use the term "trespass". The December 15 letter was sent allegedly because Mr. Smalls had issued a tweet that they would be coming to Amazon on that date. See, Tr. 1818: 7-10 However, the basis for Employer's Objection 16 is not "solicitation" but actual repeated trespass by non-employees for the purposes of union activity. The February 2, 2022 letter to counsel again refers to the solicitation policy, and takes issue with the ULP which was filed in response to the December 15 and 16th letters. The February 2nd letter refers to the setting up of tables in the front of JDK8 and LDJ5 but objects only to non-employees being present at those tables. This letter does not state what actions alleged non- employee Chris Smalls was engaging in at these tables which constituted soliciting. This letter for the first time claims a violation of the solicitation policy was trespassing.

In sum, Amazon's reliance on its solicitation policy is misplaced and to the extent Amazon relies on its violation to support a claim that Mr. Smalls was trespassing, the record evidence submitted does not support a finding that Mr. Smalls violated the solicitation policy on which Amazon's allegations of trespass are based.

3. **Mr. Smalls was In the Visitor's Parking Lot (as a Visitor) Delivering Food to the JFK8 Facility and Not Soliciting or Trespassing on the Day He was Arrested**

One way that the ALU promoted interactions with workers during the critical period was through providing food to associates in the break rooms for the day and night shift. Connor Spence testified that due to the national settlement between the Board and Amazon, the union could be in the break rooms during non-working hours. As a result, the union developed a more active presence in the break rooms. He believed this happened in December 2021 or January 2022. *See*, Tr. 4339:15-22. According to Cassio Mendoza, food deliveries to JFK8 were mostly done by Chris Smalls during the critical period. *See,* Tr. 5052: 11-14. Petitioner has taken the position that because Mr. Smalls was delivering food to the JFK8 facility, he was allowed to park in the visitor's lot near the breakroom, and Amazon should have treated him like any other "visitor" who came to visit an associate, pick up or drop off an associate and that he had a right to be there. Certainly delivering food is not a form of "solicitation". Mr. Troy was asked on cross-examination if Amazon had a policy which distinguished between authorized and unauthorized visitors and/or a policy on trespassing. He stated Amazon has "a policy that dictates what a visitor is and unauthorized visitor is but we do not have a trespass policy." *See*, Tr. 1913: 19-21. No policy with respect to who is an authorized visitor was produced by Amazon, even though the Assistant General Manager, Zach Marc, who also testified, could have produced it. Indeed, Mr. Marc acknowledged that food delivery would be an authorized use of the Amazon parking lot by non-employees. *See*, Tr.2383:24-2384:2.

Amazon, in questioning Mr. Smalls, did not ask him about the solicitation policy. Nonetheless, when asked if he returned to Amazon after his arrest to solicit, he stated that he did not believe he was soliciting. Mr. Smalls, stated: " Solicit? I don't think I was soliciting, but I did return. When asked if he continued to hand out food, Mr. Smalls said he did more than that and all of the things he mentioned were also in the nature of visiting the JFK8 parking lot. He said: " I did more than that. Sometimes hand out food. Sometimes I picked up some workers. Sometimes I dropped them off at work. Sometimes I dropped off some of the equipment that they use. Sometimes I dropped off some of the literature that they used. I usually picked it up and stored it in the truck. So yeah, I visited a couple of times." *See,* Tr. 4607:21-4608:11.

Both Cassio Mendoza and Connor Spence testified about the reason why the food delivery for the ALU was not a simple drop off. Cassio Mendoza, who testified about how long he was serving food on March 25, 2022 described why it was not a simple process for Mr. Smalls to just deliver food and leave. He said, "There's usually two lunches. So it'll be like, the inbound lunch and then the outbound lunch. So that could be, like, 30 minutes, and then another 30 minutes, and then there's time before and after. So I was there for about 2 hours" . Mr. Mendoza went on to describe how when they were serving lunches for the two groups, we would meet him[Chris] in the parking lot, get the trays for the first lunch, serve them, and then meet them in the parking lot after 30 or 40 minutes and get, like, the second round for the other lunch and go back inside." He stated that Chris would wait in the parking lot for him to take in the food and bring the trays back out. *See*, Tr. 5051:25-5052:25. Of course the workers would then bring the empty trays and utensils out to the car before he left.

Mr. Spence was present on February 23, 2022, and testified that the union provided the luncheon for the second break that day. He stated: "Mr. Smalls entered Amazon, JFK8 parking

lot to drop off some food… It was shortly before the second break. So, you know, there is, like, a period between probably, 1:30 to 2:00 p.m. Because we were doing our luncheon on the second break time, which is around the time." In response to how much time Mr. Smalls was present in the parking lot, Mr. Spence stated "He was there throughout the luncheon to provide more food, and then he was there until I was ready to leave. So that was around 3:00 p.m." *See,* Tr 4464:1-20). To the extent supporters of the ALU came on Amazon property to deliver food or other supplies to union organizers, they were visitors and not engaged in solicitation as defined in the solicitation policy. Mr. Smalls was therefore not trespassing. In fact Mr. Marc admitted that if Mr. Smalls had been on the property to deliver food he would be considered a visitor. *See,* Tr. 2462:18-22, and by definition not a trespasser. This is another reason that this objection should be overruled.

4. The Record Shows No Legal Basis for Mr. Smalls' Arrest And That Only Amazon was Responsible for his Arrest

As noted above, Mr. Smalls (1) should **not** have been considered a non-employee and therefore someone allowed on Amazon property to engage in union activities; (2) the actions he was alleged to have engaged in did not come within Amazon's no-solicitation policy; and (3) on February 23, 2022 the day he was arrested he was delivering food and was legitimately a "visitor" in a parking lot for visitors. In light of the foregoing there was no legitimate reason for Amazon to have requested Mr. Smalls to leave and/or call the police on February 23, 2022. It was Amazon's decision and Amazon's decision alone to seek to remove Mr. Smalls on February 23, 2022 when he was delivering food to the ALU volunteers.

The Employer presented the testimony of Area Loss Prevention Manager Joe Troy and Assistant General Manager Zachary Marc as some of the persons involved with the February 23,

2022 call to the police which resulted in the arrest of Mr. Daniels, Mr. Anthony and Mr. Smalls. The testimony of these management employees makes clear that it was purely Amazon's decision to call the police on February 23, 2022 and the call to the police had nothing to do with Mr. Smalls engaging in "solicitation" or being in any way disruptive to Amazon's operations. The decision to involve the police was purely the result of anti-union animus and a desire to prevent Mr. Smalls from being active in the campaign, which was at that point mainly taking place in JFK8's breakrooms. Nonetheless, Amazon seeks to advance a new theory that Mr. Smalls caused his own arrest for the purpose of garnering sympathy in order to campaign on such arrest.

As stated above Amazon may not expand its theory of Objection 16, as stated *supra.* Further, given the decision of Amazon in its sole discretion to call the police to arrest Mr. Smalls, there is no factual basis for such a theory. Nor is there any legal basis for such a theory.

In *NLRB v. Springfield Hosp*.,899 F.2d 1305, 1310-12 (2d Cir. 1990) the Court rejected precisely such a theory, finding no wrongdoing by arrested union members, and finding that the arrest at the direction of the Employer constituted an unfair labor practice entitling the union to a re-run election. In circumstances similar to those here, the Court rejected the Employer's claim that the union had invited the arrests of its leaders, finding that the Hospital was solely responsible for the arrests of union members, as is Amazon here. There, off-duty pro-union employees came to the Hospital when they were not scheduled to work and sought to talk to employees who were being called into small group meetings about the union. The Hospital Administrator falsely told the Police Captain "that a group of off-duty employees were roaming in "non-designated" areas of the hospital, distributing leaflets in the intensive care unit, disturbing visitors and interfering with patient care and hospital operations." The Board found that these were misrepresentations which the police relied on which led to the arrests.

Similarly, here the arrest was based on misrepresentations. While Mr. Marc was unaware that Mr. Smalls was delivering food, in which case he stated he should properly have been deemed a visitor, Mr. Troy—who called the police—was aware that Mr. Smalls was delivering food and yet nonetheless misrepresented to the police that Mr. Smalls was trespassing.

In fact, Assistant General Manager Marc testified that before he asked President Smalls to leave he had no idea that President Smalls was present on the property to deliver food to Amazon employees and he only learned about that after the fact after watching the full surveillance video from February 23, 2022. *See*, Tr. 2461:9-16. Mr. Marc admitted he did not see "Mr. Spence either get out of the car or them going into the break room to get -- to let people know that there was food to be delivered." *See* Tr. 2463:10-13. **In fact Mr. Marc admitted that if Mr. Smalls had been on the property to deliver food he would be considered a visitor. *See,* Tr. 2462:18-22, and by definition not a trespasser.** [31]

Yet, Joe Troy testified that on February 23, 2022 he was aware of the fact that Mr. Smalls had arrived to deliver food to employees in the breakroom and that within 35 minutes of his arrival to deliver food, Mr. Troy made the decision to call the NYPD to enforce the employer's property rights. *See*, Tr. 1970:24-1974:6. Similarly, Mr. Troy misrepresented the situation to Deputy Inspector Ceprano of the 121st Precinct by failing to mention that Mr. Smalls was present in the parking lot delivering food, thus legitimately a visitor. While Mr. Troy "walked the Deputy

[31] Mr. Marc's involvement as the assistant general manager (as opposed to security or loss prevention) in seeking Mr. Smalls' removal from Amazon property is likely based on his bias against Mr. Smalls coming onto Amazon property dating back to when Mr. Smalls led the walkout over health and safety during COVID in 2020. He did not want Mr. Smalls on Amazon property then, and he expressed his deep hostility to Mr. Smalls when he described in hyperbolic terms his personal opinion that Mr. Smalls "deserved to be terminated" See, Tr. 2441:19-21, in 2020. Later, when the NYPD was arresting Amazon employees along with President Smalls, Mr. Marc admitted that he knew that the employees who were being arrested were leaders of the Amazon Labor Union and he took no steps to stop their arrests. *See* Tr. 2469:19-2470:7.

Inspector through the multiple attempts to get Mr. Smalls to respect Amazon's property rights since December" *See,* Tr. 1979:20-1980:3, he failed to tell Deputy Inspector Ceparano that he did not consider Mr. Smalls to have been a safety risk on any date prior to February 23rd, (with the possible exception of December 15) *See,* Tr. 1964:2-22.

Further Mr. Troy claimed he called the Deputy Inspector because he did not want there to be a "scene", in light of the union campaign, yet he failed to communicate that desire to the Deputy Inspector, thinking his rank was high enough that he would know not to cause a scene, and would handle the matter appropriately. *See,* Tr. 1978:14-1980:6 The only thing Deputy Inspector Ceparano asked Mr. Troy was whether the company was prepared to support trespassing charges if he was arrested, to which Mr. Troy responded yes. *See* Tr. 1980:13-19. Mr. Troy claimed Mr. Smalls was a danger to Amazon associates on February 23, 2022 not because of anything he was doing, but because Amazon called the police and Mr. Smalls was allegedly not responding to their requests to leave. *See*, Tr. 1984:24-1985:5.

A video of the arrest (Emp. Ex. 344v) establishes that Mr. Smalls informed the police that he was a visitor who should be allowed on premises. Due to the misrepresentation by Mr. Troy to the police, they did not ask any further questions of Mr. Troy, or credit Mr. Smalls' statement that he was a visitor. They merely proceeded to give Mr. Smalls two minutes to leave. The video shows that when it got close to the two-minute mark, Mr. Smalls said, "Okay I am leaving" and walked to the car. Before he could leave, the police arrested Mr. Daniels, and Mr. Anthony and then turned to Mr. Smalls who was at the door of the car while the police arrested him.

Under these circumstances, and given the misrepresentations by Mr. Troy, there was no reason for Amazon to have called the police, as admitted by Mr. Marc. In *NLRB v Springfield*

Hospital, the Board found the off-duty employees were not disrupting patient care, that they were engaging in protected conduct and that they were cited and arrested in areas which had been designated for their presence.[32] It was within this framework that the Board concluded that the Hospital was not justified in seeking police intervention and based in part its finding that the Hospital was solely responsible for the arrests. Just as in *Springfield Hospital* it should be found that Amazon and Amazon alone was responsible for the arrests of February 23, 2022.

While the Company argued that a prior interactions between Mr. Smalls and Mr. Marc on February 9, 2022 was a predicate for the February 23, 2022 arrest, wherein Marc had claimed Mr. Smalls was on company property filming an interview and he told Mr. Troy about his interactions with Mr. Smalls, the reality is that on February 9, 2022 just as on February 23, 2022 Mr. Smalls was delivering food to the Amazon facility. President Smalls posted a tweet that day stating he had delivered 36 pizzas that day to the breakroom. *See*, Tr. 4454:18 - 4454:25; and ALU exhibit 33.

From the above, it is clear that the Employer and the Employer alone made the decision to call the police to remove Mr. Smalls from the Amazon parking lot. It is also clear that Mr. Smalls believed he had a right to be in the parking lot as a visitor given his activities, as admitted by Mr. Marc.

5. The Arrest Of Union Organizers By Management Has Been Found To Be Coercive, Instilling Fear In The Workers. Thus, The Arrests Were Just As Likely To Cause Fear In Employees Than Sympathy For Those Arrested. Whether The ALU Campaigned On The Arrests Is Irrelevant To This Objection.

[32] In *Springfield Hospital*, the Board had also found the Hospital's no access rule to be invalid. Here Petitioner has shown that Amazon's Solicitation policy was not applicable to Mr. Smalls' conduct, and that by its terms it allowed certain approved solicitation to be allowed causing discriminatory application against unions trying to organize the workers.

In addition to trying to blame Mr. Smalls for inviting his own arrest, Amazon absurdly claimed that the Petitioner had sought the arrests in order to use them in their campaign against Amazon. These claims are absurd and not supported by any evidence. Not only would Mr. Smalls, as a Black man in Staten Island, fear being arrested, but also it is common sense that the arrests themselves are coercive and would instill fear in the rest of the workforce, and make them afraid to vote for the union, the opposite of what Amazon suggests. The coercive nature of arresting union leaders was found to be an unfair labor practice in *NLRB v Springfield Hospital, supra.* That is, in *Springfield Hospital* there were two units which had their elections on the same day. The union won one of them, and lost the other. The Board certified the unit the union won, and ordered a new election in the other based on finding the arrests to be coercive. That is, the ALJ further found that since the arrests "were likely to interfere with, restrain, and coerce [the Hospital's] employees in the exercise of their Section 7 right to engage in union activity," the Hospital had violated Section 8(a)(1) of the Act." Id. at 1310, requiring a new election. Petitioner submits that the arrests of Mr. Smalls and others on February 23, 2022 were without justification and aimed at chilling Sections 7 rights. Amazon should not be allowed now to claim its own misconduct is attributable to the Petitioner.

Further, Amazon's suggestion that the presence of a camera crew on February 23 at the time of the arrest was consistent with Mr. Small's orchestrating his arrest is equally baseless. Amazon was aware that there were film crews, and an independent documentary film crew that had been following the ALU for the previous year. Indeed, Ms. Monarrez stated "a couple of cameramen would come by the JFK8 building every single day and also follow us to some of our events away from Amazon whenever we did rallies." *See*, Tr. 4115:8-13.

It is clear that a main aspect of Amazon's campaign strategy was the vilification of Christian Smalls, who had not only led the 2020 walkout, but had come back to try to unionize JFK8. Mr. Pat Cioffi, who had decided to support the union about a week before the arrests *See,* Tr. 4930:1-6, stated that in his efforts to campaign for "yes" votes for the union he confronted this vilification of Smalls.[33] Mr. Cioffi said:

> "Okay. So at Amazon, the Union busters, they were going around. It wasn't about the Union; they were making it about Chris Smalls. So Chris Smalls was a thug. Chris Smalls is going to buy a Lamborghini with your dues [tuition] money. And Chris Smalls was this, Chris Smalls was that. All kinds of accusations against Chris Smalls. So all I did to the people that were -- I wouldn't say no, a lot of no's because of that fact and a lot of maybe because they weren't too familiar with the aspect of the Union. I made it about -- the Union is not about Chris Smalls. It's not about me. It's not about any other person. It's about the workers. This is what I explained to the people. So being that I have a lot of trust in that building, I've been there for two years, and I got along with every associate in there, as well as senior level management. And once I had a conversation with them, I made them understand that it wasn't about Chris Smalls. And it wasn't about Amazon or Chris Smalls. It was about them. It was about their job security and better wages for them. And that's how you could say, I flipped them from a yes to a no. Or to a maybe to a yes. I mean, to a no to a yes. I'm sorry. *See*, Tr. 4952:13-4953:12.

Mr. Cioffi further testified that the video of the arrests was being spread around the warehouse not by the Petitioner to garner sympathy, but rather by management. He stated that a manager showed it to him, telling him that "Chris Smalls got arrested with a bunch of other clowns. This was how it was phrased. And I looked at the video and I seen them getting arrested. *See*, Tr. 4963:23-4965:4. Petitioner asserts management showing the video of Smalls being arrested is consistent with the chill found in *Springfield Hospital*.

6. **There Is No Evidence Provided By Amazon To Support Objection 16 As A Matter Of Law.**

[33] *See*, e.g., Emp. Ex 239.

As noted, Objection 16 and the allegations of mere trespass are not coercive and cannot be grounds for overturning an election under all but the most extreme circumstances. Far from this objection being valid, Amazon cited no cases which claim that "trespass" by itself is objectionable conduct. Amazon ties the alleged trespass to the arrests of February 23, 2022, a month before the election. As noted, the purpose of the arrest was not to enforce Amazon's solicitation policy, which it equated with trespass, but rather to further vilify Mr. Smalls, who was legitimately a "visitor" on February, 23, 2022, and the arrests were an attempt to weaken the support for the Union.

Nonetheless, the Employer failed to submit any evidence as to the impact of the February 23rd arrests on the bargaining unit. Mr. Cioffi was already a supporter when the arrests happened. This situation stands in stark contrast to the one case cited by Amazon in their objections, *Phillips Chrysler Plymouth*, *supra*. This case illustrates why objection 16 is legally deficient in addition to not being factually supported. None of the *Phillips* facts are present here. The so-called trespass which gave rise to Mr. Smalls' arrest happened a month before the election, and the union won by over 500 votes. Further, the Board has distinguished *Phillips Chrysler* on precisely these grounds, which case has been affirmed in the courts of appeals. *See NLRB v. Earle Industries, Inc*., 999 F.2d 1268, 1274 (8th Cir. 1993); *Family Services Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383 (D.C. Cir. 1999).

For all these reasons Objection 16 must be overruled.

E. The Employer Failed to Demonstrate that Petitioner Engaged in Unlawful Polling or Interrogation

Objection 17 States:

> **Objection 17:** The Petitioner unlawfully polled employee support, engaged in unlawful interrogation, and created the impression of surveillance during the critical period.

Objection 17 alleges that the Union polled employees, engaged in interrogation, and created the impression of surveillance. But, of course, a union is permitted to poll employees and ask them about their support for the union, including how they plan to vote and when. *See Springfield Discount*, 195 NLR 921, *enf'd*, 82 LRRM 2173 (7th Cir. 1972); *Keeler Die Cast v. NLRB*, 185 F.3d 535, 539 (6th Cir. 1999), *cert. denied*, 529 U.S. 1018 (2000); *Maremont Corp. v. NLRB*, 177 F.2d 573, 578 (6th Cir. 1999). Indeed, a union must poll in order to support its petition with a showing of interest.

Amazon's suggestion that asking when employees plan to vote "gave the impression that the ALU would surveil when and if they chose to vote," does not follow logically and, even if it did, it is not objectionable for a union agent to observe the polling area—the mere presence of union representatives in the vicinity of the polling area, without more, is not objectionable as explained above in relation to Objections 9, 23, and 25.

The only evidence presented in favor of this objection was some campaign materials used by the ALU. *See*, Emp. Ex. 369. This document is nothing more than a simple non-coercive form asking employees to vote yes and asking when they intend to vote. This is simply not coercive from any objective standpoint. Amazon's further suggestion that asking employees to "sign a commitment that they would vote "Yes" 'gave the impression that they could not change their mind," borders on the absurd in a secret ballot election. The same could be said about the cards unions are required to gather to support a showing of interest in every election conducted by the Board.

The case cited by Amazon, *Kusan Mfg. Co. v. NLRB*, 749 F.2d 362, 365 (6th Cir. 1984), actually undermines the objection. It holds, "pre-election polling by the union is not inherently coercive." *Id*. at 364. While it continues to state that "an employer may successfully challenge a representation election if he shows that pre-election polling by the union *in fact* was coercive and *in fact* influenced the result of the election," *id*. at 365, Amazon's objection does not state any facts suggesting the polling here was coercive in any way.

On March 21, 2022, the ALU sent a text message to every member on the Voter List which stated, inter alia "Can I count on you to vote yes? (P.S. please reply Stop if you don't wanna chat.)" *See*, Tr. 4351:11 - 4356:13; *See also*, Emp. Ex. 516. There is nothing about this text which is in any way coercive.

Amazon did not carry its burden to prove Objection 17.

F. The NLRB Does not Enforce the LMRDA and in Any Event Voters Understood They were Voting for the ALU

> **Objection 18:** After disparaging—and celebrating its independence from—established, institutional unions for months leading up to the vote, the Petitioner's President and attorney asserted in 11th hour communications to voters that the Petitioner was backed by established unions with millions of union members, that those more-established unions were actively involved in the Petitioner's campaign, were providing funding and other services to the Petitioner, and would also be involved in contract negotiations if the Petitioners was elected. These misrepresentations are objectionable conduct because, under the circumstances, employees were unable to discern the truth of these statements regarding which labor organization would be representing them.
>
> **Objection 21** The Petitioner failed to file forms required by the Labor Management Reporting and Disclosure Act of 1959 ("LMRDA") The LMRDA requires all unions purporting to represent private sector employees to file, among other things, detailed financial reports. To date, the Petitioner has not filed any financial or other reports required

> by the LMRDA despite being under a legal obligation to do so. The Petitioner's failure to comply with the LMRDA deprived employees from access to the critical financial information about the Petitioner's operations during the critical period (i.e. whether to vote for them as thief bargaining representative)

Objections 18 and 21 relate to similar issues regarding information available to voters. Objection 18 claims that because Petitioner made claims about being an independent Union while simultaneously receiving support from established unions, voters would somehow be unable to discern the identity of the union that was actually on the ballot. Objection 21 alleges that because Petitioner failed to file reports with the Department of Labor (DOL) pursuant to the Labor Management Reporting and Disclosure Act of 1959 [LMRDA], voters were deprived of information, especially financial information, to make a free choice.

Petitioner is in fact an independent union, but that fact is not inconsistent with an independent Union also receiving support and solidarity from more established unions. The ALU does in fact have that support and the Employer failed to demonstrate otherwise. There was no misrepresentation by Petitioner in that respect. Nonetheless, even if the claims of support were not true, which is not the case, it has been clear for 40 years that campaign misrepresentations are not objectionable. *See Midland National Life Ins. Co.*, 263 NLRB 127 (1982). The only exceptions are forged documents and official Board documents that are altered to suggest the Board favors one outcome over another. Neither exception is implicated here.

Representations of support from third parties are not objectionable whether they are well founded or not. At most they are misrepresentations or mere "puffery". *See Shirlington Supermarkets,* 106 NLRB 666, 667 (1953); *Smith Co*., 192 NLRB 1098, 1101-02 (1971). It is well settled that the Board will no longer probe into the truth or falsity of the party's campaign statements.

Despite the Hearing officer specifically referencing the 40 year precedent of *Midland National Life Ins. Co.*, 263 NLRB 127 (1982) that the Board will not investigate the truth of representations made by either the employer or union, Amazon pursued this Objection with President Smalls and refused to withdraw it. See, Tr. 4613:20 -4614:19. President Smalls stated the union was independent and also had the support of other unions. **No witness** called by Petitioner testified that they were unable to discern what union they were being asked to select as their bargaining representative on the ballot. It was clear that only the ALU was on the ballot. This objection must be overruled. In fact, even raising this objection was legal error and constitutes frivolous and sanctionable conduct.

As to Objection 21, it is well settled that violations of the Labor-Management Reporting and Disclosure Act of 1959 (LMRDA) do not affect Board policy, since Section 603(b) of the Act explicitly provides: "nor shall anything contained in [Titles I through VI] . . . of this Act be construed . . . to impair or otherwise affect the rights of any person under the National Labor Relations Act, as amended." An organization's (or its agent's) possible failure to comply with the LMRDA should be litigated in the appropriate forum under that Act, and not by the indirect and potentially duplicative means of the Board's consideration in the course of determining the union's status under Section 2(5) of the Act. *Caesar's Palace,* 194 NLRB 818, 818 fn. 5 (1972); see *Meijer Supermarkets, Inc.*, 142 NLRB 513, 513 fn. 3 (1963); *Harlem River Consumers Cooperative*, 191 NLRB 314, 316 (1971). A violation of the Labor-Management Relations Act of 1947 was likewise held not to disqualify a petitioner from filing a representation petition. *Chicago Pottery Co.,* 136 NLRB 1247 (1962). As stated in *Lane Wells Co.,* 79 NLRB 252, 254 (1948), "excepting only the few restrictions explicitly or implicitly present in the Act, we find nothing in Section 9, or elsewhere, which vests in the Board any general authority to subtract from the rights of employees

to select any labor organization they wish as exclusive bargaining representative." *See also, National Van Lines*, 117 NLRB 1213 (1957).

Failure to file reports with the DOL, whether required by the LMRDA or not, is not objectionable. The Board rejected an objection identical to that made here and was affirmed by the D.C. Circuit in *Family Services Agency San Francisco v. NLRB*, 163 F.3d 1369, 1383-84 (D.C. Cir. 1999). In that case, like here, the employer argued, "the union's refusal to file was a violation of employees' Section 7 rights to know about union finances and other matters in order to make an informed election choice." *Id*. at 1383. But the Board and Court held that the LMRDA has its own enforcement mechanisms and is enforced by the DOL, not the NLRB. *Id*., at 1383-84. The NLRA gives the Board no authority to enforce the LMRDA through the objection procedure. *See also Desert Palace, Inc. v. Local 711 Union of Gaming,* 194 N.L.R.B. 818, 818 n. 5 (1972) ("The NLRB is not entrusted with the administration of the [LMRDA]. An organization's possible failure to comply with that statute should be litigated in the appropriate forum under that act, and not by the indirect and potential duplicative means of our consideration).

This Objection should be overruled as a matter of law. In fact, even raising Objection 21 was a fundamental legal error and amounts to frivolous and sanctionable conduct by Amazon.

G. <u>The Employer Completely Failed to Present ANY Evidence in Support of Objection 19</u>

Objection 19 states:

> **Objection 19:** Petitioner's supporters misled employees by telling them that they would lose their health benefits if they did not support the Petitioner Relying on language barriers and misrepresentations of the elections processes, during the critical period, Petitioner's organizers specifically targeted Amazon employees who recently

> immigrated from Africa and threatened that their continued benefits were contingent on their support of the Petitioner While the Petitioner's conduct in this regard is a deplorable scare tactic targeted at an immigrant population, these false threats also constitute objectionable conduct because they reasonably tended to coerce employees into supporting the Petitioner solely out of fear that they would lose their benefits

Petitioner is an organization that is committed to promoting the "fight" for a better world for all. Its symbol intentionally shows racially diverse fists emerging together from a box. The Employer's Objection 19 which claims the ALU would intentionally target a vulnerable community is an outrageous lie. It is contrary to the unity of the ALU's message which has always been a positive one. It is not surprising, therefore, that the Employer failed to put on any evidence that the ALU or anyone acting on its behalf took any action against a vulnerable immigrant community. By presenting no evidence to support this Objection, the Employer has utterly failed to meet its burden of proof. Objection 19 was and is clearly frivolous and the Employer should be sanctioned for having even raised it. This Objection must be overruled.

H. The Light Projection Was Not Within 24 Hours of the Election Nor Was it a Captive Audience Speech or a Misrepresentation

Objection 20 states:

> **Objection 20:** The Petitioner deployed a light projector outside the JFK8 facility that projected mass messaging on the façade of the JFK8 building immediately prior to the election. Late at night on March 23, 2022, and through the early morning hours, after the voting tent was in place, the ALU projected messaging on the front of JFK8 immediately over the polling area which read: "Amazon Labor Union"; "VOTE YES"; "VOTE YES! TO KEEP YOUR PHONES"; "BE THE FIRST IN HISTORY"; "THEY FIRED SOMEONE YOU KNOW"; "THEY ARRESTED YOUR COWORKERS"; and "ALU FOR THE WIN". The Petitioner's light projections are also objectionable misrepresentations inasmuch as they caused confusion about the identity of the messenger, suggested that Amazon supported the

> messaging, and misrepresented the purpose and consequences of the vote. The Petitioner's light projections also(reiterated the Petitioner's false campaign narrative that the Employer sought the arrest of employees.

Objection 20 alleges that the Union projected messages onto the face of the JFK8 facility in the 24 hours before the election and that it constituted both objectionable misrepresentations and a violation of the rule against addressing massed assemblies established in *Peerless Plywood Co*., 107 NLRB 427 (1953). Both theories are baseless.

First, of all, even if the statements were misrepresentations, which they are not, misrepresentations are not objectionable. Second, projecting images onto the Employer's facility is not a violation of the 24-hour rule established in *Peerless Plywood*. That case established a rule "that employers and unions alike will be prohibited from making election speeches on company time to massed assemblies of employees within 24 hours before the scheduled time for conducting an election." *Peerless Plywood*, at 429. Most obviously, there was no "massed assembl[y]." Equally obvious, there was no "speech[]" to anyone massed or not. Furthermore, It was undisputed that the projection occurred on March 23, 2022, ***more than 24 hours prior to the election***. *See*, Tr. 4378:15 - 4380:16; Tr. 4448:14 - 4449:6; *See also,* Emp. Exs. 385-V, 386, 2923, 2923-V, 2924, 2924-V, 2925, 2925-V, 2926, 2926-V; Tr. 4390:13 - 4390:24; Tr. 4392:16 - 4393:5. The fact that the ALU's Instagram post depicting the projection occurred on March 24 is simply evidence that the projection occurred ***before*** the posting was actually made. It is also undisputed from a review of the videos of the light projection that it was a rainy evening and very few people appeared to be outside during the time of the projection. *See*, Emp. Exs. 2923-V, 2924-V-, 2925-V, 2926-V.

The case cited by Amazon in the Objections that they presented to the Regional Director, *Bro-Tech Corp*., 330 NLRB 37 (1999), is inapposite. It involved a union blasting pro-union messages via a sound-truck to the workers amassed inside the facility. The Board explained the Hearing Officer's reasoning and concluded that:

> the *Peerless* prohibition, as interpreted in *U.S. Gypsum Co.* and *O'Brien Memorial*, included within its proscription the use of sound trucks for communicating campaign speech when those communications extended through the time the election was in progress. She found that the music, unavoidably audible to employees at their work stations, constituted "speech" within the meaning of the proscription because the songs' lyrics were more than mere *exhortations* to vote, and included campaign phrases which amounted to last minute emotional appeals designed to sway voters.

Id. at 38. Thus, in *Bro-Tech*, unlike here, there was both a massed assembly and an address to that assembly. In fact, the only cases in which the Board has applied *Peerless Plywood* to union conduct have similarly involved the use of a sound truck or loudspeaker system to reach employees assembled inside a facility. *Compare United States Gypsum Co.,* 115 NLRB 734 (1956) (setting aside the election where a union blasted campaign speeches into the employer's facility from a sound truck for more than seven hours the day before the election), and *Industrial Acoustics v. NLRB*, 912 F.2d 717 (4th Cir. 1990) (holding that the broadcast of union campaign messages from a loudspeaker within a parked car near the plant entrance violated *Peerless Plywood*), with *NLRB v. Glades Health Care Ctr.*, 257 F.3d 1317, 1320 (11th Cir. 2001) (finding no *Peerless Plywood* violation where a union held a rally across the street from the employer's facility within twenty-four hours of the election because there was no "firm purpose to use vehicles equipped with loudspeakers to intentionally broadcast campaign speeches into the employer's facility so that the employees at their work stations could not avoid hearing it").

Even when employer conduct is at issue, the Board has clearly held that "[t]he *Peerless Plywood* rule . . . does not apply to posters or other campaign literature." *Pearson Education, Inc.*, 336 NLRB 979, 0979 (2001). *See also Myrna Mills, Inc*., 133 NLRB 1740, 1743 (1961) ("since the poster does not constitute a speech to massed assemblies of employees," *Peerless Plywood* does not apply). Indeed, in *Peerless Plywood* itself, the Board made clear that "[t]his rule will not interfere with the rights of unions or employers to circulate campaign literature on or off the premises at any time prior to an election." *Peerless Plywood*, at 430. The projection is analogous to literature such as a pamphlet or poster, not to a speech blasted into a facility via a sound truck. The projection clearly falls outside the *Peerless Plywood* prohibition.

For these reasons, this Objection must be overruled. Again, even having raised this objection knowing that the projection occurred on March 23, 2022 constituted frivolous and sanctionable conduct by Amazon.

I. The ALU Did Not Distribute Marijuana In Return for Support in the Election During the Critical Period

Objection 22 reads:

> **Objection 22:** The Petitioner distributed marijuana to employees in return for their support in the election. The Petitioner's distribution of marijuana was an impermissible grant of benefit and interfered with employees' free choice in the election.

Objection 22 alleges that the ALU distributed marijuana to employees "in return for their support in the election", constituting an impermissible grant of benefit. But this alleged gifting of Marijuana occurred before the representation petition was filed, *i.e.*, before the critical period, which renders this Objection baseless. Moreover, the Union denies that any sharing of marijuana that took place at any time was ever contingent on support in the election, and no witness testified

to such a *quid pro quo.* Amazon presented no evidence at the hearing regarding this Objection that would merit overturning an election with a 500+ vote margin. Accordingly, the Objection must be overruled.

"A union cannot make, or promise to make, a gift of tangible economic value as an inducement to win support in a representation election." *Jam Productions, Ltd.*, 371 NLRB No. 26, sl. op. 9 (2021). But "[n]ot every grant during an election campaign requires a 'per se finding' of objectionable conduct." *Id*. To determine whether a grant is objectionable, the Board applies an objective standard, and determines whether "the donor's conduct would reasonably have a 'tendency to influence' the outcome of the election." *Id*., *citing Gulf States Canners, Inc.*, 242 NLRB 1326, 1327 (1979). To evaluate whether a gift would have a tendency to influence the outcome of the election, the Board examines a number of factors, including: "1) the size of the benefit conferred in relation to the stated purpose for granting it; 2) the number of employees receiving it; 3) how employees reasonably would view the purpose of the benefit; and 4) the timing of the benefit." *B&D Plastics, Inc.*, 302 NLRB 245, 245 (1991).

As stated, not every gift given in the critical period is per se objectionable conduct. Indeed, the Board has long held that certain gifts are legitimate campaign devices and non-objectionable. *See R. L. White Co.*, 262 NLRB 575, 576 (1982) ("A party to an election often gives away T-shirts as part of its campaign propaganda in an attempt to generate open support among the employees for the party. As such, the distribution of T-shirts is no different than the distribution of buttons, stickers, or other items bearing a message or insignia. A T-shirt has no intrinsic value sufficient to necessitate our treating it different than other types of campaign propaganda, which we do not find objectionable or coercive."); *Chicagoland Television News, Inc.*, 328 NLRB 367 (2000) ("absent special circumstances," parties are "legitimate campaign devices," and the Board "will

not set aside an election simply because the union or employer provided free food and drink to the employees"). As the Board explained in *Jacqueline Cochran, Inc.*,

> In NLRB elections, like political elections, parties or candidates seek through various ways to advertise their special qualities in order to appeal to the electorate. …. Thus, when the union distributes, without cost to eligibles, trinkets like balloons, plastic rain hats, rabbits' feet, combs, pens, compacts, or tickets for a chance on prizes and does not make such distribution contingent upon the outcome of the election or how particular eligible will vote, the Board does not find such advertising to constitute a gift or bribe or the bestowal of an economic benefit sufficient to impair the free choice of employees.

177 NLRB 837, 839 (1969).

Additionally, a union may confer some benefits in order to encourage attendance at meetings or other forms of union interaction, or to spread word of the union campaign, or to make itself more attractive to employees. *Gulf States Canners*, 242 NLRB at 1327-28 (finding that union's provision of free gas to two employees was not objectionable as it was made "to encourage attendance at the union meetings and to spread word of the union campaign"); *Jacqueline Cochran*, 177 NLRB at 839 (finding that union's provision of free turkeys to all employees was not objectionable as it "was to encourage eligibles to come to its meeting, to generate a kindly feeling toward the Union and to make it more attractive as the bargaining agent"). Instead, gifts are objectionable only when they have a tendency to impair employees' free choice by "subject[ing] the donees to a constraint to vote for the donor union." *Mailing Servs., Inc.*, 293 NLRB 565, 565 (1989), *quoting Wagner Elec. Co.*, 167 NLRB 532, 533 (1967). That is, the gift must be one that has such value to the recipient that the recipient would feel a sense of obligation to vote for the union.

"As a general rule, the period during which the Board will consider conduct as objectionable is the period between the filing of the petition and the date of the election." *Dolgencorp, LLC v. NLRB* 950 F.3d 540, 545 (8th Cir. 2020) (citing *Cedars-Sinai Med. Ct. & Cal.*

Nurses Assoc., 342 NLRB 596, 598 n. 13 (2004)). The Board "will not consider instances of prepetition conduct as a basis upon which to set aside an election," *Ashland Facility Operations, LLC v. NLRB*, 701 F.3d 983, 993 (4th Cir. 2012), citing *Dresser Indus. Inc.,* 242 NLRB 74, 74 (1979), and events occurring prior to the filing of the petition are assumed not to affect the outcome of an election. *NLRB v. Blades Mfg. Corp.*, 344 F.2d 998 (8th Cir. 1965).

Accordingly, the ban on union conferral of a tangible benefit upon employees it seeks to represent applies only during the critical period. In *Mailing Services, Inc.* 293 NLRB 565 (1989), for example, the Board explained that a union is "barred *in the critical period* . . . from conferring on potential voters a financial benefit," *id.* at 565 (emphasis added), and the D.C. Circuit emphasized in *Freund v. NLRB*, 165 F.3d 928 (D.C. Cir. 1999) that "a union may not give voters anything of tangible economic benefit *during the critical period*" because the parties involved in a representation election are "prevented from exercising certain rights during the *brief* time when their exercise might interfere with the voters' free choice." *Id*. at 931, 934 (emphasis added). *See also Stericycle, Inc.*, 357 NLRB 582, 586 (2011) (holding that a union's financing of litigation on behalf of employees before the critical period is not objectionable even if it may be after the filing of a petition).

Indeed, in *Werthan Packaging, Inc.* v. *NLRB* 64 Fed.Appx. 476 (6th Cir. 2003), the Sixth Circuit held that a union's provision, before the critical period, of jackets, football tickets, pizza, and beer to employees at a facility it was attempting to organize "were of no moment because they did not occur during the critical period." *Id*. at 486. In the present case, ALU's supporters' alleged sharing of small amounts of marijuana similarly took place before the critical period and is therefore not objectionable.

Connor Spence credibly testified that although the ALU had gifted marijuana to JFK8 employees prior to the December 22, 2021 filing of the representation petition, marijuana was not gifted on or after December 22, 2021 due to the polarizing responses Petitioner received from the JFK8 employees. *See*, Tr. 4449:7 - 4449:20. It is presumably for this reason that a few employees mistakenly testified that Petitioner was gifting marijuana during the critical period.

Mr. Smalls, the interim President of the ALU, testified that marijuana was not gifted to associates at JFK8 during the critical period. *See,* Tr. 4561:16 - 4562:3. Mr. Smalls was questioned about statements attributed to him regarding the ALU gifting marijuana in which he testified that marijuana was only gifted before the critical period. *See, e.g.,* Tr. 4575:21-4576:1; Tr. 4576:24-4577:1.

In addition, ALU supporter Jason Anthony corroborated this testimony that no marijuana was given to associates during the critical period. *See,* Tr. 3635:16 - 3635:24 ALU Supporter Justine Medina also corroborated that no marijuana was gifted during the critical period. *See,* Tr. 3898:17 - 3898:23. When pressed on this issue by employer's counsel, Ms. Medina credibly reiterated the reasons she believed no marijuana was distributed during that time frame; if marijuana had been given away for free by the ALU, there would have been discussion in the warehouse regarding it and she was not aware of such discussions during the critical period. *See*, Tr. 3900:23 - 3901:7.

It is undisputed that up and until approximately mid- November 2021 and again after mid January 2022, the MTA maintained a bus stop for the S40 bus across the street from the JFK8 facility. See, Tr. 4451:2 - 4452:1. From mid-November 2021 to mid January 2022, the MTA temporarily relocated the S40 bus stop close to the corner of the JFK8 building in front of the recruiting office. See, Tr. 4452:2 - 4453:8; Tr. 4465:9 - 4465:16. As a result of the bus stop

move, the ALU also moved its table temporarily to the area next to the recruiting office. See, Tr. 4453:9 - 4454:8.

Witness Adina Goriva claimed she saw the ALU distributing marijuana at a table outside of the JFK8 facility to the left of the recruitment office shortly after February 17, 2022 . *See*, Tr. 936:1- 937:7. This cannot be true because the Petitioner's table had already moved back to the bus stop across the street from JFK8 by mid February 2022. In addition, on cross-examination, Ms. Goriva also admitted that she did not actually see the ALU distribute marijuana; she only saw a chalkboard that she believed had the words "Free Weed" written on it. See, Tr. 948:14 - 948:20. Ms. Goriva further admitted that she had seen the chalkboard on many days, as she walked by it every day on her way to work, and the chalkboard contained many different messages on different days all starting with the word "free." See, Tr. 949:13 - 949:13 - 951:1. Her testimony as to the date of seeing the "Free Weed" sign was further undermined by her claim that the ALU table had always been next to the recruitment office at all times since the campaign began in April of 2021. See, Tr. 955:1 - 956:21. This is also not true. Ms. Goriva's testimony should be given no weight.

Patrick Delancey testified that he saw the ALU distribute marijuana on two (2) separate occasions; once in January 2022 and again in March 2022. *See*, Tr. 1259:21 - 1260:10. However, on cross-examination it became clear that this testimony was highly unreliable. Mr. Delancey could provide no exact date for when he witnessed this allegedly occurring. He testified that he was gifted it sometime in January 2022. However he was clear that the ALU was giving away marijuana from its table at the bus stop across the street from JFK8. Additionally, Mr. Delancey failed to identify who he received this marijuana from in January 2022. This points to the fact that he most probably was confused about the timeframe and may have received marijuana prior to

December 22, 2022. *See*, Tr. 1257:4 - 1257:18; Tr. 1260:16 - 1260:25; 1266:23 - 1269:19; *See also* Tr. 4452:2 - 4453:8.

With respect to the marijuana Mr. Delancey allegedly was given in March, he testified that an individual that he identified as Tristan Dutchin, gifted him the marijuana at the bus stop across from JFK8. He noted in his testimony that President Smalls was in his car in front of the bus stop and that President Smalls was not the individual who gave him the marijuana (he also did not even testify that Mr. Smalls was even aware that Mr. Dutchin had allegedly been gifting marijuana). *See*, Tr. 1249:7 - 1249:16; Tr. 1256:13 - 1256:22. The person who allegedly gave Mr. Delancey the marijuana, Tristan Dutchin is not a stipulated agent for Petitioner. *See*, Tr. 1279:15 - 1280:23; Emp. Ex. 527. The Employer failed to call Tristan Dutchin to testify as to his agency status and in fact failed to elicit any testimony from Petitioner Officers regarding Mr. Dutchin's relationship with Petitioner Union. Mr. Delancey's testimony is not reliable and is not credible. Thus his testimony should be given no weight in support of this Objection.

Matthew Cordova's testimony is similarly suspect. Cordova testified that he saw the ALU give out marijuana between December 22, 2021 - March 30, 2022 but he could not give any more specifics as to the dates. *See*, Tr. 1297:19 - 1298:7. Mr. Cordova only believed it occurred during that time period because it was "still dark outside at the time and it was cold." *See*, Tr. 1298:8 - 1298:11. However, Mr. Cordova himself admitted on cross examination that it is also "dark and cold" in November 2021. *See*, Tr. 1306:6 - 1306:11. More importantly, Mr. Cordova did not actually see anyone give marijuana away to anybody else, all he saw was a sign that said "[F]ree [P]izza and [W]eed!" *See*, Tr. 1304:5 - 1304:12. Similarly, Moises Martinez only testified that he saw a banner "about the length of the table itself from the floor to where the table would end. I just remember reading it said, like, something to the words of get free weed if you sign up for the

Union. That's it." *See,* Tr. 3295:7 - 3295:11. He also mentioned seeing five individuals around the table. There was no testimony regarding observing anyone receiving any marijuana, nor was Mr. Martinez able to describe any of the five individuals he observed around the table. *See* 3307: 3-9. On cross examination, Mr. Martinez admitted that on the corner in front of the recruiting office where he claims to have seen the ALU giving out free weed "[t]here [are] cameras. It's right above the building. It's all over the building." *See* Tr. 3298:16-17 and ALU Exhibit 27. It should be noted that at no time in this vast record did the Employer support this Objection with surveillance footage from the cameras facing the corner outside of the recruitment office. Such an omission requires a negative inference as the only explanation for why the video was not presented by the Employer, can only be because there was no distribution of marijuana caught on tape during the critical period.

Natalie Monarrez, who made clear her antipathy and disdain for President Smalls never testified that she saw President Smalls giving out marijuana to Associates during the critical period. Instead she claimed to have seen President Smalls with a bag of marijuana. Tr. 3997:25 - 3998:9. Not once during her testimony when she was asked specifically about the critical period did she testify to seeing President Smalls gifting marijuana to any Associates. *See*, Tr. 3998:18 - 3999:2; Tr. 4000:7 - 4000:10. In fact, in contradiction to other Amazon witnesses, Ms. Monarrez claims never to have seen President Smalls with marijuana after she resigned from the ALU at the end of January 2022. *See* Tr. 4001:10-16.

Xiomara Rosado testified that there was one time somewhere between December 22, 2021 and March 30, 2022, in which President Smalls gave out marijuana "to a kid" (whose name she could not recall and whose age she was not sure of) in an outside weather enclosure at JFK8 that is used for smoking cigarettes. *See* Tr. 3073: 1-4, 3098:21 - 3099:1, 3099: 17-19. Ms. Rosado's

testimony is unreliable, not only because she was unable to testify as to a date when she allegedly witnessed President Smalls gift marijuana, but she also testified that she recognized President Smalls because a few weeks after this, she saw him distributing food ***inside*** the JFK8 break room. *See* Tr. 3074:5 - 3074:14. The employer failed to put on any evidence in support of the fact that from December 2021 to March 2022 that it ever invited President Smalls inside the breakroom to distribute food which would have been necessary to corroborate Ms. Rosado's outlandish testimony.

The employer also called Yuddelka Rosario who testified that two weeks before the election, she recalled "they were like, but we got a little bag of marijuana, we got weed, because they were celebrating that the law had passed. And I was walking there and they were like, did you sign already? Because they were looking for signatures. And I say, no. They said, if you sign, I give you a little bag. And I'm like, what, weed? I said, I don't use that. … They were trying to get a signature no matter what. They were like, we run out of pizza, we run out of t-shirt, but we still got this. They were happy because the law had passed and they could have marijuana on hand, which I believe that was not the right thing to do. … " *See* Tr. 3322:15-23, 3324:2, 3324:16-21. Not only has the Employer failed to establish the identity of the "they" she alleges spoke to her, but also administrative notice should be taken that the legalization of marijuana in New York State occurred on September 21, 2021, far in advance of the critical period.[34] *See* "All The Questions and Answers on NY Legalizing Marijuana" - The New York Times(nytimes.com) http://www.nytimes.com/article/new-york-marijuana-legalization-facts.html Thus more likely

[34] ALJs and the Board have routinely taken judicial notice of relevant federal and state statutes and regulations. See, e.g., Taylor Mfg. Co., Inc., 83 NLRB 142 n. 5 (1949) (affirming the ALJ's taking judicial notice of applicable statutes and regulations issued by the Veterans Administration); and Yellow Cab Co., 229 NLRB 1329 n. 2 (1977) (granting the charging party's request to take judicial notice of certain new Chicago regulations affecting the taxicab industry). The courts have too. See, e.g., Martinez v. Welk Group, Inc., 2011 WL 90313, at *2 (S.D. Cal. Jan. 11, 2011) ("Courts routinely take judicial notice of state or federal statutes and regulations").

than not, any celebration of the legalization of marijuana would have taken place in the fall of 2021. Moreover, the conduct Ms. Rosario describes is consistent with that of collecting authorization cards in support of the Petitioner's representation petition which it filed first on October 25, 2021, and then after withdrawal, again on December 22, 2021. Her testimony was that she remembered ALU supporters telling her, "[h]ere, you sign, we give you, it's legal. So when they tell you that it's legal, it doesn't matter because I don't use it." Furthermore, in order to establish their burden, the best evidence that the Employer could put forward for proof of the distribution of marijuana during the critical period on its property would be video from its own surveillance cameras, which surprisingly the Employer failed to produce. *See* ALU Exhibit 17. Thus there can only be a negative inference that the employer failed to produce such surveillance footage because there is no footage to support this Objection.

There is no credible evidence in the record that anyone acting as an agent of the union gave out free marijuana to any JFK8 associates during the critical period. Karen Martinez testified that while she recalls hearing another Amazon employee who supports the Amazon Labor Union announcing "free weed," when she approached the Amazon Labor Union table, she only saw T-shirts and pizza being given out by the Union. *See,* Tr. 2015:19 - 2015:25. Ms. Martinez's testimony that she heard an Amazon employee announcing "free weed" cannot be found to be credible because she was never able to provide an exact date of when she heard this announcement and her own testimony is that she never saw any marijuana. Moreover, when pressed on cross examination she admitted that she saw them offering marijuana to Associates on a prior occasion at "[t]he end of April" *See*, Tr. 2017:18 - 2017:20. But, in fact she had already testified that she never saw the ALU handing out weed "prior to the end of April." *See*, Tr. 2018:20 - 2018:22. Thus, any testimony from this witness cannot be accepted as evidence in support of Objection 22

that during the critical period, the Petitioner ``distributed marijuana to employees in return for their support in the election." As by the end of April 2022 the election tally had already been completed by Region 29.

A review of the relevant caselaw shows that the number of employees receiving the benefit must be able to affect the vote margins. *Owens-Illinois, Inc.*, 271 NLRB 1235, 1235 (1984) ("While only five or six employees received jackets before voting, the vote tally and our disposition of the challenged ballots show that five or six votes could have determined the election's results."); *see also Gulf States Canners*, 242 NLRB at 1326 (examining whether union's purchase of gas for two employees who accepted its offer to pay for gas to attend union meeting was objectionable where vote tally was 20 to 16 in favor of the union); *Revco D.S., Inc. v. NLRB*, 830 F.2d 70 (6th Cir. 1987) (finding union's offer to pay anti-union employee $100 to vote for the union objectionable because election was decided by one vote). In this election there is no conceivable way that any gifting of marijuana would affect the 523 vote margin by which Petitioner became the bargaining unite representative for Associates at JFK8.

When weighing the *B&D Plastics* factors, the Board is also more inclined to find gifts to be objectionable the closer to the election they are given. Accordingly, in *Gulf States Canners*, the Board weighed the fact that the purchase of gas for the two employees took place several weeks before the election against finding the conduct objectionable. 242 NLRB at 1328. In *Jacqueline Cochran*, the Board weighed the fact that the election was held 25 days after the provision of free turkeys to employees against finding the union's conduct objectionable. 177 NLRB at 839. In contrast, in *Owens-Illinois*, the Board found objectionable the union's distribution of jackets on election day, between voting sessions. 271 NLRB at 1235; *see also NLRB v. Labor Servs., Inc.*, 721 F.2d 13 (1st Cir. 1983) (finding objectionable the union's purchase of free drinks on election

day, between voting session), *adopted by* 274 NLRB 479 (1985). Just as with the T-shirts and food that witnesses say were also provided (and that the Employer does not object to), the Union may provide small gifts as part of its campaign propaganda, and in order to generate a kindly feeling toward the Union and to make it more attractive as the bargaining agent. *Jacqueline Cochran*, 177 NLRB at 839. Indeed, small amounts of marijuana—allegedly provided weeks before the election—has no intrinsic value that would work to constrain the donee to vote for the Union.

Lastly, the Company seems to be reaching for straws by attempting to make the argument that the Board should set aside the election because marijuana is illegal under federal law. But the status of marijuana is entirely irrelevant to the Board's role to resolve the question of representation. By making its arguments to the Board, it is clear that the Company is simply reaching for any argument it can in order to escape the representational desires of its employees'

Even if the testimony of these witnesses were to be credited, providing a small amount of marijuana long before the election places this case closer to *Gulf States Canners* and *Jacqueline Cochran*, where the benefit was provided weeks before the election and thus non-objectionable, than *Owens-Illinois*, where the benefit was provided while employees were voting.

It is clear from this review that the Company fails to meet its heavy burden to set aside the election based on its claim that the Union provided marijuana to employees "in return for their support in the election." The Company's Objection 22 must be overruled.

III. CONCLUSION

A. There Is No Misconduct Identified That Has A Tendency To Interfere With Employees' Freedom Of Choice

In challenging a representation election, the objecting party bears the entire burden of adducing prima facie facts sufficient to invalidate the election. *See NLRB v. Hood Furniture Mfg. Co., 941 F.2d 325, 328 (5th Cir. 1991)* The test—which is objective—is whether the party's misconduct "has the tendency to interfere with employees' freedom of choice." *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (1995); see *Hopkins Nursing Care Center*, 309 NLRB 958 (1992); *Baja's Place*, 268 NLRB 868 (1984); see also *Jurys Boston Hotel*, 356 NLRB 927, 928 (2011) (expressing test as whether conduct "could . . . reasonably have affected the results of the election"); *Safeway Inc*., 338 NLRB 525, 526 fn. 3 (2002) (same); *NLRB v. Enterprise Leasing Co. Southeast, LLC*, 722 F.3d 609, 619 (4th Cir. 2013) (subjective reactions of employees irrelevant to question of whether there was, in fact, objectionable conduct).

This burden is not met by proof of misconduct, but "[r]ather, specific evidence is required, showing not only that unlawful acts occurred, but also that they interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election. *Kux Mfg. Co. v. NLRB*, 890 F.2d 804, 808 (6th Cir. 1989) citing *NLRB v. Bostik Div., USM Corp.,* 517 F.2d 971, 975 (6th Cir.1975), (quoting *NLRB v. White Knight Mfg. Co.,* 474 F.2d 1064, 1067 (5th Cir.1973)). (citing *NLRB v. Golden Age Beverage Co.*, 415 F.2d 26, 30 (5th Cir. 1969)). Specific evidence of specific events is required, showing not only that the acts occurred, but also that they "interfered with the employees' exercise of free choice to such an extent that they materially affected the results of the election. *See NLRB v. Hood Furniture Mfg. Co.*, 941 F.2d 325, 328 (5th Cir. 1991) (citing *NLRB v. Golden Age Beverage Co.,* 415 F.2d 26, 30 (5th Cir.1969).) Some assurance must be in the record to show that the election results were not reflective of employees' desires. *NLRB v. Monroe Auto Equip. Co., Hartwell Div.,* 470 F.2d 1329, 1332 (citing *NLRB v. Golden Age Beverage Co*., 415 F.2d 26, 30 (5th Cir. 1969); *Southwestern*

Portland Cement Co. v. NLRB., 407 F.2d 131, 134; *Anchor Manufacturing Co. v. NLRB*, 300 F.2d 301, 303.) For conduct to warrant setting aside an election, not only must that conduct be coercive, but it must be so related to the election as to have had a probable effect upon the employees' actions at the polls. The presumption is that ballots cast under the safeguards provided by Board procedure reflect the true desires of the participating employees. *See NLRB v. Zelrich Co.,* 344 F.2d 1011, 1015 (5th Cir. 1965) This is a burden akin to a "clear and convincing" standard and not one by a "preponderance" of the evidence. The record is clear that not only was Amazon unable to present evidence of specific unlawful acts attributed to either Petitioner or Region 29, but it also failed to connect any allegation to any material effect on the election results to overturn an election won by a margin of over 500.

B. No Agent Nor Third Party Conduct in the Critical Period Is Objectionable

In cases raising allegations of pre-election campaign interference, the Board may need to address as many as three major questions: (1) whether the individuals alleged to have engaged in objectionable conduct were agents of either party (i.e., whether the conduct is attributable to one of the parties); (2) whether the conduct itself is objectionable misconduct; and (3) if the conduct is deemed objectionable, whether it warrants invalidating the election because it is "more than de minimis with respect to affecting the results of the election." See, e.g., *Mercy General Hospital*, 334 NLRB 100 (2001).

Generally, the Board applies common law principles of agency, including principles of apparent and actual authority, in determining whether alleged misconduct is attributable to a party. See, e.g., *NLRB v. Downtown Bid Services Corp.*, 682 F.3d 109, 113 (D.C. Cir. 2012); *Mar-Jam Supply Co.*, 337 NLRB 337 (2001); *Cooper Industries*, 328 NLRB 145 (1999); *Fieldcrest Cannon,*

Inc., 318 NLRB 470 (1995); *Culinary Foods, Inc*., 325 NLRB 664 (1998); *General Metal Products Co*., 164 NLRB 64 (1967); *Dean Industries*, 162 NLRB 1078, 1093–1094 (1967); *Colson Corp. v. NLRB*, 347 F.2d 128, 137 (8th Cir. 1965).

Agency is not established merely on the basis that employees are engaged in vocal and active petitioner support. *United Builders Supply Company*, 287 NLRB 1364, 1365 (1988). See also *Tuf-Flex Glass v. NLRB*, 715 F.2d 21 291, 296 (7th Cir. 1983), attending organizing meetings or soliciting cards on behalf of the petitioner does not, standing alone, render employees agents of a petitioner. *Health Care and Retirement Corporation of America v. NLRB*, 255 F.3d 276 (6th Cir. 2000). Employee members of an in-plant organizing committee are not, simply by virtue of such membership, agents of petitioner. *Advance Products Corp*., 304 NLRB 436 (1991), as well as *Health Care and Retirement Corporation of America*.

The employer spent over eight hours eliciting testimony attempting to establish that Jason Anthony and Justine Medina were Petitioner's agents and failed. They called Stephanie Lopez to testify that she *believed* Jason Anthony supports the ALU but that she had never seen him sitting at the ALU table in the break room. *See* Tr. 2739. Thus Ms. Lopez's testimony did not establish Mr. Anthony to be an agent. The employer also called Lori Adenji who also *believed* that Jason Anthony was an agent because he was a part of the individuals that came into the February 7, 2022 small group meeting, wearing an ALU shirt and was speaking in support of the ALU. *See*, Tr. 1505:12 - 1505:21. Clearly this is not enough testimony to establish that Mr. Anthony played the role as the responsible representative of the union in the plant and played a central role in the election campaign. *Vickers, Inc.*, 152 NLRB 793, 795 (1965). Mr. Anthony and Ms. Medina identified themselves as volunteer worker organizers and there are no identified activities by either that fall under any of the Employer's 25 Objections.

The Organizing Committee, also known as the Workers Committee or the Stewards Committee is a body of workers that is open to anybody that wants to volunteer to spread a pro-Union message, give out information about the union, encourage workers to vote yes and help get authorization cards signed. *See*, Tr. 4307:5 - 4307:17, Tr. 4308:13 - 4308:21. At one point there were approximately 100 members on the Workers' Committee because anybody who was a vocal supporter of the ALU could consider themselves a member. *See*, Tr. 4315:4 - Tr. 4315:10. Essentially any pro-union worker had access to the ALU's campaign materials and could distribute them. *See*, Tr. 4315:25 - 4317:5.

Although the term "lead organizer" was used by several individuals that volunteered for the ALU during the critical period, "lead organizer" was just an informal title that people gave themselves if they believed they had put in more work than others or were more vocal than others. *See*, Tr. 4319:6 - 4319:15. Connor Spence, Petitioner Officer, testified that he was not even aware that Jason Anthony was using the term "lead organizer" to refer to his status with the ALU during the critical period. *See*, Tr. 4319:16 - 4321:15.

The Employer's Objections that are focused on the Petitioner's conduct are 13-25. Amazon failed to establish that any conduct of the union's agents at issue reasonably tended to interfere with the employees' free and uncoerced choice in the election. However, Objections 1-12 are focused on the Region's conduct. The Region was not a party in this election.

If alleged misconduct cannot be attributed to one of the parties, the Board will only set aside the election if the misconduct "was so aggravated as to create a general atmosphere of fear and reprisal rendering a free election impossible." *Westwood Horizons Hotel*, 270 NLRB 802, 803

(1984). This standard is more difficult to meet than the already not met standard applied to party conduct.

C. The Election Results Are Not Narrow

There is no evidence that any conduct by any witness who testified in this long trial tended to interfere with employees' freedom of choice. Thus, in *Cambridge Tool & Mfg. Co.*, 316 NLRB 716 (2000), the Board, in setting the election aside, emphasized that the election might have been decided by **only one vote**, and that accordingly three instances of objectionable conduct "could well have affected the outcome of the election." The Board distinguished certain other cases, noting they did not involve a close election. *Id*. at 716 fn. 5; see also *Jurys Boston Hotel*, 356 NLRB 927, 928 (2011) (emphasizing misconduct could have affected an election decided by **one vote**). The election in the instant matter was won by 523 votes.

If the vote margin in a representation election is very narrow, minor violations should be more closely scrutinized. In other words, when the apparent degree and multitude of the violations are small and the margin of the vote is wide, the less merit inheres in a petition for overturning the Board's decision upholding an election or denying an evidentiary hearing. *See United Steelworkers of Am., AFL-CIO v. NLRB*, 496 F.2d 1342, 1347 (5th Cir. 1974). Under *NLRB v. Bancroft Mfg. Co*., 516 F.2d 436, 444 (5th Cir. 1975), in deciding if an election should be set aside due to pro-union statements made in the course of the election campaign, although material misrepresentations, the Union's adequate margin of victory (56% of the vote) convinced the court that the Board did not abuse its broad discretion in representation matters by finding that the Company had failed to show that the Union's statements so lowered the tone of the campaign that the free choice of a majority of the employees cannot be determined from the election results.

Similarly, in this election, Petitioner won with 55% of the valid votes counted and thus employees' free choice has not been interfered with.

D. Amazon's Objections Should Be Rejected In Their Entirety

Under the 2014 amendments to the Board's election procedures, the Regional Director's decision may include a certification of the results of the election, including certification of representative where appropriate, and shall be final unless a request for review is granted. Thus Petitioner requests that the Regional Director reject in whole the Employer's Objections 1-25 and certify the April 1, 2022 Tally of Results in this election issuing a Certification to the Amazon Labor Union as bargaining representative for Associates at JFK8.

Dated: August 1, 2022

Respectfully submitted,

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UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR REALTIONS BOARD
TWENTY-NINTH REGION

AMAZON.COM SERVICES LLC,

Employer

and **Case: 29-RC-288020**

AMAZON LABOR UNION,

Petitioner

CERTIFICATE OF SERVICE

I, ERIC MILNER hereby certify that the Petitioner's Post Hearing Brief in Opposition to Amazon's Objections to the Election was e-filed in 29-RC-288020 on Region 28 of the National Labor Relations Board and served by electronic mail on August 1, 2022, on the following parties:

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